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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1408.

ANDREW CALTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 20, 1888.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Bill of exceptions	1	1
Testimony of Jerry Tiberty	2	1
P. B. McKeon	28	18
Dr. Allen Fowler	39	25
Jesse Baldwin	44	27
Joseph Hague	52	32
Jesse Baldwin (recalled)	56	34
Dr. Allen Fowler (recalled)	62	38
A. W. Mawrey	64	39
A. M. Stoddard	67	41
P. B. McKeon (recalled)	68	41
A. J. Lewis	69	42
O. S. Carver	80	48
W. H. Burnison	84	50
George Hall	90	54
W. H. Burnison (recalled)	91	54
A. J. Lewis (recalled)	92	55
O. S. Carver (recalled)	94	56
Charge of the court to the jury	96	57
Official reporter's certificate	107	62
Motion for new trial	108	63
Allowance of bill of exceptions	110	64
Acknowledgment of service of bill of exceptions, etc	110	64
Clerk's certificate to bill of exceptions	111	64
Notice of appeal	112	64
Charge of court	113	65

	Original.	Print.
Instructions of prosecution refused	119	67
Instructions of defense refused	120	68
Instructions of prosecution given	122	69
Instructions of defense given	125	71
Judgment and sentence	127	72
Verdict	129	72
Order fixing time for judgment, etc	129	72
Jury called	130	73
Order for venire to issue, etc	131	73
Order to withdraw venire, etc	132	74
Plea	132	74
Arraignment	133	74
Indictment	134	75
Clerk's certificates	136	76
Argument	138	77
Submission	138	77
Judgment	138	77
Opinion	140	77
Dissenting opinion	155	84
Writ of error	165	87
Waiver of citation	166	87
Submission of petition for rehearing	167	88
Order overruling petition for rehearing	167	88
Affidavit of pauperism	168	88
Assignment of errors	169	89
Clerk's certificate	173	90

1 In the second judicial district court, Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff,
vs.
ANDREW CALTON, DEFENDANT.

Bill of exceptions.

On the part of the above-named defendant, and statement on motion for a new trial, and on appeal.

Be it known that on the 22nd of September, A. D. 1887, the above case was called for trial.

C. W. Zane, assistant U. S. prosecuting attorney, and W. H. Dickson, of counsel, appearing for the prosecution, and Presley Denny and John Ward Christian, attorneys appointed by the court, appearing for the defendant. A jury was empanneled and the trial proceeded, and the following witnesses testified as follows, which includes all the testimony given on the trial of the above case. On the argument of said case, the jury, C. W. Zane, district attorney for said district, opened said argument to the jury, and after argument by counsel for defendant, W. H. Dickson closed the argument for the people at 6 o'clock p. m. Recess till seven o'clock p. m.

That the jury then retired and the court took a recess until about ten o'clock in the evening, when the jury announced their verdict, during which time the prisoner was taken from the court-room by the officer having him in charge to the county jail, he being confined in prison without bail.

The prisoner was present in court throughout the trial and until after the jury retired to consider their verdict, and was returned into court before and was present in court while and until after the jury had returned their verdict.

2 In the district court for the second judicial district of the Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
ANDREW CALTON. } Indicted for murder.

Before Hon. J. S. Boreman and jury.

Appearancer: For the people, Chas. W. Zane and W. H. Dickson; for the defendant, Presley Denny and John Ward Christian.

Testimony.

JERRY TIBERTY, being first duly sworn, was called for the prosecution.

Examined by Mr. DICKSON:

Mr. DICKSON (to witness). Speak out distinctly so that all these jurors can hear you.

Mr. DICKSON (to jurors). And if any of you gentlemen can't hear, just asked to have it repeated, and we will have the witness speak louder.

Q. What is your full name?
A. Jerry Tiberty.
Q. Where do you live?
A. I have been living out at the mines.
Q. Where is that?
A. Star district.
Q. Where were you living on the 14th of July last?
A. I was living at the Mammoth mine.
Q. Star district?
A. Star district.
Q. Do you know the defendant Andrew Calton?
A. Yes, sir.
Q. How long have you known him?
A. I have known him by sight for 12 or 13 years.
Q. How long have you been acquainted with him?
A. In the neighborhood of 7 or 8 years.
Q. Did you know Michael Cullen in his life-time?
Yes, sir.
Q. Where was he living on and prior to the 14th of July last?
A. He was living, I believe, at the Mammoth mine. He always slept under the same roof with me.
Q. Did you occupy the same bed with him?
A. No, sir; we didn't occupy the same bed. We were under the same roof; same house; he slept in one room and I in another.
Q. How long had Mr. Cullen been living there prior to the 14th of July last?
A. I could not say; I think it was some time in October.
Q. Of the year before?
A. Yes; I think it was; I don't know.
Q. Where was the defendant living immediately prior to the 14th of July last?
A. I believe he was living in Shaunty.
Q. Where is that in reference to the Mammoth mine; about how far?
A. I guess may be a couple of miles; may be a little farther. I never went over there from the Mammoth.
Q. Were you in the town of Milford on the 14th of July last?
A. I was, sir.
Q. How did you go there from Star district?
A. I went down with Calton.
Q. The defendant here?
3 A. Yes, sir.
Q. How?
A. With a team.
Q. Whose team?
A. I believe it belonged to a man by the name of Bingnan.
Q. Who provided that team?
A. Mr. Calton, I suppose.
Q. You didn't furnish it?
A. No; Calton got it.
Q. You went with him?
A. Yes, sir.

Q. Were there two horses or one?

A. There was a horse and a mule.

Q. Did you observe when you started from Star district that morning to go over to Milford how the defendant was dressed; that is, whether he had any coat on?

A. He was in his shirt sleeves—blue flannel shirt.

Q. Did you see any coat?

A. No; when I got into the wagon I was going to make the remark that it looked like raining, and if he didn't have a coat with him he had better go and get one; and he attracted my eyes to the wagon and I saw his coat there in the wagon.

Q. How was it in the wagon?

A. Rolled up; and I think there was something—a grain sack—wrapped around it.

Q. What time did you reach Milford that day?

A. I guess it must have been in the neighborhood of ten or eleven o'clock.

Q. Had you or Calton been drinking before you started to Milford?

A. No, sir.

Q. Not on the way?

A. No, sir.

Q. It was between *and* ten and eleven o'clock before you reached Mil*d*ord?

A. Yes, sir.

Q. What was the first thing you did when you got there?

A. Alighted out of the wagon, both of us. I think we stopped over at the artesian well and gave the horses some water.

Q. When you got into town did you put the team up?

A. No, sir.

Q. Did you see Michael Cullen?

A. Yes, sir; he came right along to the wagon; we passed him as we was driving along, but we didn't stop; we had alighted about two minutes when he came up to the wagon.

Q. At Milford?

A. At Milford.

Q. You didn't see him on the way?

A. No, sir; he stopped at my place, I believe, where he and I slept.

Q. You didn't see him on the way along that morning?

A. No, sir.

Q. But saw him when you got there?

A. Yes, sir.

Q. How long were you in company with him when he came up to the wagon?

A. I guess, may be, a half an hour together.

Q. What were you doing?

A. We went into Dock Hague's, at his request, and had a drink.

Q. Do you know what the defendant and Mr. Cullen drank?

A. I think we all drank whiskey.

Q. Well, then, did you three separate?

A. Well, we didn't exactly separate right then, but we were separated afterwards.

Q. I mean after you had that drink; did you separate before you had another drink?

A. No, sir; we didn't have any other drink before we separated.

Q. Where did you go then?

A. I went into the store then.

Q. What store?

A. Campbell's.

Q. Who went with you?

A. I don't know as anybody went with me.

Q. Calton or Cullen?

A. I don't think either one of them went with me.

Q. When did you next see Calton and Cullen together?

A. Oh, they were back and forward and back and forward; I had seen them several times together; I met also in company maybe a dozen in the store—something of that kind, because Campbell had just got back from the South, and there was a lot around there to see him.

Q. Now, when you had this first drink, after you got into town, how long was it before you got to drinking again?

A. I think maybe in the neighborhood of over an hour.

Q. Where did you drink then?

A. Williams'.

Q. What did you all drink then?

A. I think we all drank whiskey.

Q. Had you had any more than two drinks before this; after this last time?

A. No, sir.

Q. Had you before that time; I speak of these two, the one you had in Hague's and the one you had in Williams'?

A. No, sir.

Q. Did you have any more than one drink at that time at Williams'?

A. No, sir.

Q. How long before you came together again?

A. I staid in the store for quite a while, and I believe Mr. Cullen came in the store and got three dollars off Mr. Campbell; or at least Campbell came out from the back of the store and gave him three dollars.

Q. How long was that after you had the second drink?

A. Quite a while.

Q. Give us your best recollection.

A. In the neighborhood of an hour or an hour and a half.

Q. After the second meeting?

A. Yes, sir.

Q. Was Calton there then?

A. I could not say; if he was he was in the back room of the store. There was a good many there.

Q. Did you have any drink at that time?

A. No, sir.

Q. When next did you drink with Calton or Cullen, or both of them?

A. I went out to look for Calton shortly after; maybe half an hour after Cullen got the money from Campbell, and I found them both down to Dick Catlin's standing at the bar. I walked in. They looked like they had just had a drink. Calton asked me to take a drink, and I took beer.

Q. Did the other men take a drink then?
A. No; I believe they had before.
Q. Did you remain in the saloon then?
A. Yes; I remained in the saloon quite a little bit, and I believe I made the remark to Calton that it was getting time to go home.
Q. What time was it then?
A. In the neighborhood of three o'clock.
Q. What next was done; did you have another drink before you left the saloon?
A. No, sir; Calton left then.
Q. Where next did you and Cullen meet Calton, after you and he and Cullen went out of Catlin's; where did you meet Calton?
A. I think we met him at the store.
Q. At Campbell's store?
A. I think so.
Q. Have any more drinks there?
A. No.
Q. Did you drink together again that afternoon?
A. Yes.
Q. When next?
A. Well, we drank together again in, I guess, in the neighborhood of an hour before we started from town.
Q. Where did you drink then?
A. We drank at Mr. Williams'.
Q. All three?
A. All three.
Q. What did you drink?
A. Beer.
Q. Do you know what the other two men drank?
A. I think Calton drank beer.
Q. Do you know what Cullen drank?
A. I could not tell you what Cullen did drink.
Q. Is that the last drink you had before leaving town?
A. No; we had one in Dock Hague's.
Q. How long was that before you left?
A. Just a little; shortly before we left.
Q. Do you mean just a few minutes?
A. Yes, sir.
Q. What did you drink then?
A. Beer.
Q. What did Calton drink?
A. Beer.
Q. And Cullen?
A. I paid no attention to what Mr. Cullen drank.
Q. Where did you go after leaving Hague's saloon, after that time?
A. We drove around the corner and drove down to Dick Catlin's there.
Q. Did you take a drink there?
A. No, sir; I didn't.
Q. Did the other two?
A. No, sir; I don't think so.
Q. Did they go into the saloon?

A. They did.
Q. Did they buy any liquor there?
A. I don't think they did.
Q. Do you know whether, before you left town that afternoon, Cullen bought any liquor?
A. Yes; he bought a soda-water bottle full from Mr. Williams.
Q. How long before you left?
6 A. About an hour before we left.
Q. Did you buy any?
A. I did.
Q. Where?
A. Williams'.
Q. How much?
A. A pint flask I believe.
Q. Well, after leaving Catlin's saloon where did you go?
A. We drove in front of Billy Williams' again I think.
Q. Go in there?
A. I think we did.
Q. Drink there?
A. No; I don't think we did drink there. I don't think any of us drank there.
Q. Where then did you go?
A. I think we started for home.
Q. Did you start for home that afternoon? Did Calton go anywhere to get any things that he wanted to take up to the mines—ore sacks or anything?
A. We had them all in the wagon while driving round there. He had in the neighborhood of five hundred sacks.
Q. Where did he get them?
A. Campbell's warehouse.
Q. Did you have any conversation with him about going for those ore sacks?
A. Yes, I went with him.
Q. Did he speak to you about it?
A. Yes, sir.
Q. What did he say?
A. Said he was going up for some sacks.
Q. About how long before you started out of town after that; after you went for the ore sacks?
7 A. We had the ore sacks on while driving around to Catlin's and Williams' both.
Q. How long was it that you got the ore sacks before you went out of town?
A. I think about an hour and a half.
Q. Well, after going up to Williams' saloon, the last time, you say you don't think they drank after that?
A. I think we stopped again at Dock Hague's.
Q. Did you get anything to drink there?
A. Yes, sir; I think we did; and Mr. Cullen paid him a dollar and told Dock to give him the change back; and then he asked Dock to give him a pint of whiskey for that. Dock refused to do it, and told him he had had enough. Mr. Cullen said, "Well, we can get it somewhere else, then."

Q. What did you drink there?
A. Beer.
Q. What did Cullen drink?
A. I didn't pay any attention; I suppose he might have drank beer or whiskey.
Q. How long was it after that before you started out of town?
A. I think we started right off out of town then.
Q. In this same team that you and Calton came into town with?
A. Yes, sir.
Q. What position did you occupy in that wagon?
A. Calton and Cullen sat in the seat in front and I got on top of the ore sacks.
Q. Who was driving?
A. Calton.
Q. He was on the right-hand side?
8 A. Yes; what they call the off side of the wagon.
Q. And Mr. Cullen sat on his left?
A. Yes.
Q. Where was the whiskey, if you know; the two little bottles of whiskey, if you know?
A. I had one in my pocket, and Mr. Cullen's I shoved among the ore sacks.
Q. What was the first thing that happened?
A. We started out of town, and I says, "We didn't have a drink before leaving town;" says I, "We'll take a drink now," and the three of us drank, and I never put the bottle in my pocket any more.
Q. What did you do with it?
A. After we drank and crossed the railroad track Calton's whip-lash came ——.
Q. What did you do with the flask first?
A. Just had it in my hand; didn't put it up at all; and the whip-lash dropped off, and I jumped off to get it; I jumped off several times that afternoon while driving through town to get the whip. It kept coming off. So when I jumped off to get the whip-lash I asked Calton for the stock.
Q. What did you do with the whiskey?
A. I left it on the ore sacks.
Q. Where?
A. Behind the seat. And I asked Calton for the whip-stock. It delayed us for a minute or two while I was tieing this whip-lash on so it would stay on. About the same time that I was doing that Mr. Cullen asked for a drink, and I says there is some at your hand if you will turn around and get it. It was right behind the seat on the ore sacks. So they got the whiskey; whether they drank or not I don't know,
9 because I was trying to fasten the whip on tight so it would not come off again, and I was not looking at them.
Q. Go on.
A. When I got through tieing on the whip-lash I raised my hand and asked them if they had been drinking. I says, "If you fellows have been drinking without offering me a drink you are fine fellows", or something like that, "to take a drink without offering me any." Calton says,

"Yes; Mike has got the bottle." And says he, "Mike, give Jerry a drink; it is his whiskey." At the same time Mr. Cullen had the bottle under his arm like that. Calton reached out and got hold of the neck of the bottle and hung on to it.

Q. Who did?

A. Cullen. He just held on to it this way, with his arm. They was scuffling that way, and spilled about half the whiskey, and I told them to stop and not to waste it. I seen that Cullen was not willing to give the whisky up, and I says, "damn the whisky; I don't want none of it; drive on," says I; and I walked ahead, thinking they would follow me. Between that time I maybe walked on a few steps ahead. Calton got the whisky away from Mr. Cullen by this time, and he hollowed for me to come back. He kind of held the bottle up and says, "Here it is; I have got it," or something like that.

Q. Calton did?

A. Yes. So I came back and took the bottle and put it in this side pocket; and I told them to drive on and I would walk. Says I, "That might be the last whisky you will get on the way." I turned round after I started and gone a little way, and I seen Calton raise in the wagon—raised straight up in the wagon; and I didn't know what he raised for; I didn't have any idea about a quarrel or anything of
10 that kind then; and I happened to turn around and look back and I seen that they both had hold of each other.

Q. How?

A. They both had hold of each other by the neck.

Q. What did you do then?

A. I run back and I put my foot on the front hub of the nigh wheel to get up and separate them.

Q. What kind of a wagon was that?

A. It was a kind of a square wagon; and I got in behind the seat.

Q. What was their position when you got back there?

A. Calton was leaning over the dashboard and Cullen was in the seat.

Q. Take hold of me and show where Cullen was with reference to Calton and yourself when you got there.

A. Now, we will call this the dashboard of the wagon, and here the side; I was up here like this with my foot on the nigh hub. Cullen never raised out of the seat that I could see, and Calton laid in this position over the dashboard, and they had hold of each other's throats like this with their left hands. [Witness illustrating the position the three occupied.]

Q. Cullen was sitting in the seat?

A. Yes.

Q. Go ahead.

A. I told them, says I, "What are you quarreling about? Two friends quarreling for nothing, you ought to be ashamed of yourselves;" and I tried to coax them to let go. Finally I said, "If you don't let go I will put you both out."

COURT. Did Cullen have his back to Calton?

A. No; he was sitting in the seat like this, and had hold of
11 Calton like this, the same as this was him sitting here. [Witness showing the positions Cullen and Calton occupied to each other.]

COURT. If I understand you right, you say they were leaning upon the dashboard?

A. They were laying kind of that way—Calton lying over the dashboard and Cullen sitting in the seat, ahold of Calton like that. [Witness illustrates the positions again.]

COURT. I don't understand that yet.

A. Suppose this was this wagon, here was the dashboard, and this was the side—the wagon pointing this way. Cullen was facing the dashboard and Calton was laying with his shoulder on the dashboard.

COURT. I understood you to say Cullen was.

A. No; Cullen was sitting in the seat. Well, I said, if you fellows don't let go I will pull you both out. And I tried there for a couple of minutes to separate them. Finally Mr. Calton, he was the first one to say "let's quit."

Q. Before that what did they do?

A. Well, Cullen he says, "You will choke, will you, you son of a bitch," and he had his hand up like this and was going to strike him, and as he went to hit Calton—and I believe he got the first blow—I run this arm between them so that it saved him from the balance. And Calton then he said, "let's quit." As soon as he said that they both let go their holts.

Q. Where was Cullen then?

A. In the seat.

Q. Had he got out of his seat at all up to this time?

A. No, sir; not that I could see.

Q. What next did you see?

A. Calton picked up this bundle with his——

Q. How long was that after he made the remark, "let's quit?"

12 A. I don't believe he was standing in the wagon as he picked the bundle up; I think he got it after he jumped.

Q. How did he get out of the wagon?

A. Jumped out.

Q. Did he put his foot on the wheel?

A. I could not tell you.

Q. He lit on the ground on his foot?

A. Yes, sir.

Q. Did he fall when he lit on the ground?

A. Not that I could see.

Q. Then what was done?

A. The team started and I jumped from the position—I was on the wheel—and I catched the nigh horse by the bridle; I got the bridle reins first, and then I got hold of the bridle. It was some time before I could get hold of the bridle.

Q. Your hands are crippled, are they not?

A. Yes, sir.

Q. State what was said then, if you remember.

A. He says, "You will abuse me," or "You will choke, you son of a bitch."

COURT. Who said so?

A. Calton. Just as I turned around—I didn't think there was a six-shooter in the outfit; never dreamed of it—I turned round after I got a good hold of the horses, and I saw the gun up.

Q. In whose hands was it?
A. In Calton's.
Q. Did he take it out of that bundle that he took out of the wagon?
A. Yes, sir.
Q. Well, when he made this remark, "You will choke, you son of a bitch," did he have the six-shooter in his hand then?
13 A. No, sir.
Q. That was before you saw the six-shooter.
A. He was making that remark all the way from the time he lit out of the wagon.
Q. From the first time that you heard him cursing——
A. I heard him cursing Cullen after he got out, and he said, "I don't give a damn whether you are Mat. Cullen's brother or not, you can't abuse me."
Q. Did you see the weapon in his hand at that time?
A. Yes, sir.
Q. What was Cullen doing then?
A. Sitting in the seat.
Q. What next happened?
A. The next thing, when I saw the gun, I was more surprised than anything else, because I didn't think there was a gun in the outfit. I says, "Don't do that whatever else you do," I said to Calton, and the first shot went off; and I think it was the second or third shot missed. Whether it was an empty chamber or not I don't know, but he told me afterwards himself that it was the second shot that missed.
Q. How long a time was it after you first saw the pistol before the first shot was fired?
A. Not half a second.
Q. And then what was said?
A. He kept on shooting, and when the shot missed——
Q. I mean right after the shooting.
A. I thought that the first shot would end it. Before he found another load, after that one missed, I hollowed him to quit. I says, "For Christ's sake quit that," and he says, "Oh, he is dead." Says he, "The
14 first shot killed him, and I might as well give him the rest;" and I says, "No, he is not dead;" but he kept on firing. I says—kept saying,—"Quit that; he is not dead." And he kept on firing till he emptied the gun.
Q. When was it that he said to you that it was the third shot that missed?
A. The second shot?
Q. Yes.
A. He said it to me when we was coming down on the wagon to Milford with the body.
Q. How did he come to tell you that?
A. I believe I made the remark that I thought the thing was over when that shot missed, and I said that I didn't know whether it was the second or third shot that missed, and he told me it was the second.
Q. After the shooting started did you leave the horses' heads?
A. No, I hung on; the horses got kind of scared.
Q. Well, what next took place right after the shooting?

A. I says, "Here, we have got to go back to Milford," and he said, "Yes." My hat came off when I was trying to separate them, and I didn't go back after it. I staid at the horses' heads after the shooting, and Calton saw it first and picked it up.

Q. What did he do with it?

A. I told him that was my hat, and he said, "No, it is mine;" and I told him his was on the ground, and showed him where it was.

Q. Where was his hat?

A. On the ground, a little ways away.

Q. Did he get them both?

A. Yes, sir; then he got his.

Q. After handing you yours then he got his own?

A. Yes, sir.

15 Q. Did you have any conversation there before you started back?

A. No; that is all I said.

Q. Did you say anything about your wishing you had caught him?

A. Well, I made the remark that I wish I had let the team go and tried to grab him.

Q. When did you make that remark?

A. Just when we turned around.

Q. Go on.

A. He said it was no use. "I would have catched him any way."

Q. Who drove back to town?

A. Mr. Calton.

Q. Where were you riding?

A. I got in the same position I was when we left—on the ore sacks.

Q. Where was the body or corpse?

A. On the seat by Calton.

Q. Did you have to hold it on the seat?

A. Yes.

Q. What position was the head of Cullen as he sat up in the wagon?

A. Well, it could not have fallen back much, because the ore sacks were piled by the seats pretty high, and I think his head leaned back on them.

Q. That was a covered wagon?

A. Yes, sir.

Q. And that space inside was filled with ore sacks?

A. Pretty near; we had a little grub in the wagon besides the ore sacks and some——

Q. Well, never mind that. So that the head of the body had 16 fallen back, laying on the ore sacks as you drove back into town?

A. Yes, sir.

Q. During the time that Calton said, "Let's quit," and they let go of each other, from that time on, what, if anything—what did you hear Cullen say?

A. I didn't never hear Cullen make a word at all. He made a kind of a groan at one time during the shooting; that is all I heard him say.

Q. Did he speak at all?

A. No, sir.

Q. Did he attempt to get up at all?

A. No, sir; that is what made me make the remark that I he thought was not dead, because he didn't make a move.

Q. How near to the wagon was Calton standing while delivering these shots?

A. Right close up.

Q. How close?

A. I don't suppose he was two feet from the wagon.

Q. On the same side of the wagon that Cullen was sitting on?

A. No; Cullen was, I think, pretty near on the opposite side of the wagon.

Q. Did you have any further conversation going into town besides what you have related?

A. Yes; I made the remark to Calton that I was sorry for such a thing happening. He said he was sorry, too. He said he didn't pack that gun for Cullen.

Q. Did he say who he packed it for?

A. He mentioned somebody else—a man by the name of Dan Mackintosh.

Q. What did he say about him?

A. He said he wished it was him instead of Cullen.

17 Q. He said he wished it had been Dan Mackintosh instead of Cullen?

A. Yes; and then he said after that, "You have got nothing to be sorry for." I said to him, "I have got something to be sorry for." He said, "You had nothing to do with it only to try to stop it."

Q. Did you take the same road back to town that you came out on?

A. Yes. He asked me on the road down, just outside of town, where we should drive to, and I told him in front of Campbell's store.

Q. Did he do so?

A. Yes; and I went into the store and I met Mr. Stanley. I think he was sprinkling the floor.

Q. Well, never mind that.

A. I went into the store and told him Mike Cullen is dead. And he says, "Dead?" and I says, "Yes; Andy Calton killed him."

Q. Did you go out immediately after that?

A. I went into the office and I came out of where the door was.

Q. Did you hear Calton say anything about it over there—about it after you came out?

A. Not exactly then, because I was a little occupied——

Q. Never mind that.

Q. We drove the team down to Mowray's, and I helped to pack Mr. Cullen in.

Q. You did yourself?

A. Yes.

Q. Was Calton taken down there?

A. He was under arrest.

Q. Was he taken down to Mowrey's?

A. Yes.

18 Q. Did you hear him say anything further about it there?

A. I heard him—he shook hands with several fellows there, and he made the remark two or three times—he said he didn't think that they would shake hands with a murderer.

Q. Did you hear him say anything further about it that night? Eat supper with him?

A. No; I didn't eat supper with him.

Q. You didn't speak with him?

A. No, sir; I could not tell whether I did or not. I was busy helping.

Q. Did you see him afterwards?

A. Yes, sir; I was chained to him.

Q. Where were you when you were chained to him.

A. We were chained together in Mowrey's—in the dining-room, I think.

Q. Did you talk about the matter, you and he?

A. We was held together about—he asked me what I was arrested for. Says he, "You had nothing to do with it." "Why," says I, "a man ain't supposed to know whether I did or not, if I didn't have anything to do with it."

Q. Did he say anything about what would be done in the morning?

A. He said, "You had nothing to do with it, and you will be all right in the morning," and he made the remark to me, "My life," says he, "ain't worth a cent to me now."

Q. Did you see that gun afterwards?

A. I don't think I ever had the gun in my hands. I seen the gun. Baldwin showed it to me.

(Mr. Dickson hands the gun to witness.)

Q. Did the gun resemble that one?

A. If it is not that one, it is very much like the same.

19 Q. Did you observe what Calton did with the gun after he got done shooting?

A. I think he put it back in the wagon in the coat.

Q. Were you there at the wagon after you drove back to town when the gun was taken out of the wagon by the officer?

A. I don't exactly know whether I got out by the time the gun was gone or not.

Q. Didn't observe who took it?

A. I think he undertook to give up the gun himself.

Q. Calton did?

A. Yes.

Q. Where was this—where did this shooting take place?

A. I think it was maybe a mile and a half, maybe more, west of Milford.

Q. On the road to Star?

A. Yes, sir.

Q. In Beaver County?

A. Yes, sir.

Q. In this Territory?

A. Yes, sir.

Q. You spoke of seeing Calton, immediately after he alighted, take from a bundle this gun?

A. Yes; he also had a belt, and also a scabbard.

Q. Was the pistol in the scabbard?

A. Yes, sir.

Q. Was that bundle that you saw him take out of the wagon with him,

and with a pistol out of the coat, the same one that you saw him start out with in the morning?

A. Yes, sir.

Q. Did he have a coat on while about Milford?

20 A. No, sir.

Cross-examination by Mr. DENNY:

Q. Did you say it was about eleven o'clock when you arrived at Milford?

A. I think it was somewhere about that time.

Q. Whereabouts did you say that you saw Michael Cullen when you got into town?

A. We saw him just as we stopped at the artesian well.

Q. And you and Calton and Cullen immediately went into Dock Hague's for the first time?

A. After we watered the team we went in and took a drink.

Q. You went over to William's; you say you drank there?

A. It had been some time before we went into William's.

Q. How long did you remain in Dock Hague's?

A. I don't think more than ten minutes.

Q. How many drinks did you take in there?

A. Not only one at that time.

Q. Did Calton take more than one at that time?

A. No, sir; not that I seen.

Q. Did Cullen?

A. Not that I seen.

Q. Then where did you go?

A. I believe I went to the store.

Q. How long before you went down to William's?

A. I guess it must have been an hour or an hour and a half.

Q. How long did you remain at William's?

A. Well, we didn't remain very long there.

Q. Did you take a drink there?

A. Yes, sir.

Q. And then went to Catlin's?

21 A. No, sir; I went back to the store again; I don't know where the others did go.

Q. You parted, then, with Calton and Cullen?

A. Yes.

Q. When did you next see them?

A. I saw Calton in the store back and forwards, and I saw also Cullen back and forwards; but I was not in their company; I was talking with somebody else.

Q. Do you know whether at that time they had been out drinking?

A. I don't know.

Q. Don't know whether they were to William's or Catlin's?

A. No, sir.

Q. How long was it after you were at William's before you were in Catlin's?

A. It was along in the afternoon.

Q. And you each took a drink there?

A. I went down and found beoth of them standing at the bar.

Q. How long had it been since you last saw them?
A. I guess about an hour and a half.
Q. How many drinks did you take there?
A. I don't know.
Q. Don't know?
A. Don't know.
Q. Were they standing at the bar?
A. Yes.
Q. Did you see them drinking there?
A. Not while I stood there. I believe I saw Calton and Cullen; they looked like to me that they were just after a drink. Calton asked me to take a drink and I went up and took one.

22 Q. Then, didn't they drink again?
A. No, sir.
Q. Didn't Calton?
A. No, sir.
Q. Cullen?
A. No, sir.
Q. Did they look as though they had been drinking?
A. Well, Cullen looked as if he had been drinking considerable.
Q. How did Calton look?
A. He didn't appear to me any different.
Q. Did you all leave there together, then?
A. No, sir; Calton left first.
Q. Do you know where he went?
A. I think he told me he was going to see Campbell.
Q. Where did you next meet?
A. Next we met at the store.
Q. How long did you remain there?
A. We went and put in the stuff that we had to go home with.
Q. Then you went over there to Hagues?
A. No, sir; we went to put in some groceries. I had some stuff and I guess Calton had some stuff, and Cullen also had some stuff; I believe that he had got some three or four hundred feet of fuse and three boxes of caps——
Q. Well, I don't care for that. After that you went to Hagues?
A. No, sir; I believe we went up there to the warehouse after the ore-sacks.
Q. Did you go to William's or Hagues first after you went for the ore-sacks?
A. We drove back down town, and I believe we drove to Catlin's.

23 Q. Did Cullen and Calton drink there?
A. No; I don't think they did—I know I didn't. I don't think I went into the house at all.
Q. They got out, did they?
A. Yes; I believe they got out; but I don't think I went into the house at all.
Q. Was you sitting in the wagon?
A. No, sir; they were in there quite a time.
Q. Do you know what they went in for?
A. Drinks.

Q. Where did you go from there?
A. Drove back to William's.
Q. Did you get out there?
A. I did.
Q. Did you not go in and take a drink?
A. Yes, sir; we all took a drink there. There is where Cullen got the whiskey, and me.
Q. Each got a bottle there?
A. Yes.
Q. Then after you left William's, did you go by C. Dock Hagues' place again?
A. Yes, sir.
Q. Stopped there and got another drink?
A. Yes, sir.
Q. All that time Cullen was pretty drunk, was he not?
A. Well, I have seen him drunker than I really seen him then.

By Mr. DICKSON:

Who?
A. Cullen.

By Mr. DENNY:

How was Calton as to being intoxicated?
A. I didn't notice.
24 Q. He was not much—was he drunk then?
A. I could not say that he was drunk.
Q. Considerably under the influence of liquor?
A. I expect he was.
Q. They were friendly, Calton and Cullen, all this time, were they not?
A. They seemed to me to be.
Q. Do you know how long they had been together. How long had you known them prior to that?
A. I don't know that they were often together.
Q. How long had they been in that neighborhood? Were they well acquainted with each other?
A. I expect so.
Q. Did you ever see them at the Mammoth together?
A. I never had seen them but once together before that. Calton was on the Mammoth dump with Cullen and me both.
Q. How long had Calton been in the neighborhood prior to this?
A. Somewheres in the neighborhood of a year and a half.
Q. When they met in Milford they met as old acquaintances, did they not?
A. Yes.
Q. Then after you left Hagues, after you took the last drink and started home, you took another drink from the bottle shortly after you left?
A. Yes, sir; after we got out of town a little ways we took another drink out of the bottle we had in my pocket.
Q. Did you take more than one drink after you left town and until this difficulty occurred?
A. I never took but one drink.

Q. Did Calton and Cullen?

25 A. I could not say; they got the bottle—they asked for the bottle when I got out to fix the whip; I could not swear whether they took a drink or not.

Q. You took one drink; and you said "They were great fellows to take a drink without offering you one," or something like that.

A. No; I got out of the wagon for this whip-lash; then Calton and Cullen took another drink—I supposed they had; whether they did or not I don't know; I didn't see them do it; I supposed they did.

Q. Then is when Calton wanted Cullen to give you the bottle for you to take a drink?

A. Yes, sir.

Q. How long was that before the shooting occurred, or before you first saw them quarreling?

A. Maybe two or three minutes.

Q. Was the time very long?

A. No, sir.

Q. Did they speak?

A. They had spoken.

Q. When you first looked back there, you say Cullen had Calton pushing him over the dashboard?

A. No; when I first looked back I saw Calton raise up in the wagon; what he raised for I don't know. Then I looked back again and seen them both quarreling, and then I run back.

Q. You said that Cullen made a remark to Calton?

A. Yes; says he, "You will choke, will you, you son of a bitch."

Q. He had him over the dashboard?

A. Yes, sir; they both had hold of each other about the same way.

Q. How was that?

26 A. Calton was on the dashboard in front, like this; and Cullen was sitting in the seat, and they had each other by the neck, like this. [Witness illustrating.]

Q. How large a man was Cullen?

A. Maybe about 170 or 180 pounds.

Q. A man of great strength?

A. Well, yes; I think he was a stout man.

Q. A man that could easily handle a man like Calton?

A. I could not say. From the looks of him I would say that he could handle him easy enough.

Q. You say the second shot—you wanted to know when you turned around which shot missed?

A. Didn't know whether it was the second or third that missed.

Q. Did you say that you didn't know that there was a pistol in the party up to this time?

A. No, sir; I didn't.

Q. Didn't Calton fire it off going over to Milford, or after you left Milford and before this occurred?

A. I never seen it, if he did.

Q. How many shots do you recollect being fired?

A. There was five shots went off.

Q. The pistol went off six times?

A. But five went off.
Q. Did you examine Cullen after the shooting?
A. I didn't; I didn't notice him.
Q. He sat up in the seat going back?
A. Yes, sir.
Q. Did either of you hold him.
A. I didn't.
Q. When you said, "Don't do that," Calton said "He is already dead?"
A. No; he didn't say that before any shot was fired.
Q. How many times did you make that remark, "Not to do that?"
27 A. I didn't make it any more until after the first shot went off. Then I says "For Christ's sake quit that," then he made the remark that he was dead; he says, "The first shot killed him."
Q. And the second shot was the one that missed fire?
A. I think so—I wouldn't swear to that; I don't know whether it was the second or third, but Calton told me it was the second. I thought it was the third.
Q. After the shooting you turned and went to Milford? Calton drove back to Milford, you say?
A. Yes.
Q. And when you told him you were sorry, he told you he was sorry also.
A. Yes. When we crossed the railroad track he says "He is breathing yet."
Q. Who says that?
A. Calton made the remark that he thought he was breathing. I was so glad to hear of it that I kind of made myself believe that he was breathing.
Q. Did you examine him at that time?
A. I did not.
Q. He said "He didn't pack that gun for Cullen?"
A. Yes; said that "He didn't pack that gun for Cullen."
Q. What time in the afternoon when this occurred?
A. Well, I should judge it was between five and six o'clock; somewhere in that neighborhood.
Q. Give the time, as near as you can, between the different shots?
DICKSON. Have him clap his hands about as the shots went off.
DENNY. Indicate, as near as you can, the time between the different shots by clapping your hands.
[Witness indicates by clapping his hands.]
28 WITNESS. The first went off, the next one missed. I think it was the next one; I would not be sure. [Witness indicates by clapping his hands.]
Q. Did they come that quick? (Counsel clapping his hands.)
(No answer.)

Redirect examination by Mr. DICKSON:

Q. I understood you to answer Mr. Denny that Cullen had been there at the Mammoth for a year and a half; don't you mean that he was in the neighborhood of Mammoth for a year and a half?
A. He was in the neighborhood of the North Star.

Q. You mean to say that he was in the neighborhood of the Mammoth about a year and a half?
A. Yes, sir.

P. B. McKEON, having been first duly sworn, was called for the prosecution.

By Mr. DICKSON:
Q. What is your name?
A. P. B. McKeon.
Q. Where do you live?
A. Here in Beaver, at present.
Q. Where were you on the 14th of July last?
A. At Milford.
Q. Did you know Michael Cullen in his lifetime?
A. Yes, sir.
Q. Do you know the defendant, Andrew Calton?
A. Yes, sir.
Q. Do you know Jerry Tiberty?
A. Yes, sir.
Q. Where were you in Milford on the 14th of last July?
A. I was there helping Jim Andrews load some cattle.
Q. Did you see these three men?
29 A. Yes, sir.
Q. What time in the day did you see them?
A. I saw Cullen somewheres about ten o'clock in the morning—ten or eleven. I don't remember when I saw those three—at what time, only that they were going out, going down to the granary after some flour, down to Mr. Stanley's. I was coming up from the cattle-yard and met the team. Calton was driving the team and Cullen was sitting in the seat with him, and as they passed me Calton asked if I didn't want to buy a mule; he had a mule and a horse in his wagon. And I saw Tiberty running along the sidewalk.
Q. What time was that?
A. In the neighborhood of seven o'clock.
Q. In the evening?
A. Yes, sir.
Q. Are you sure about that being about the time?
A. Yes, sir; that was about the time; the Frisco train had got in and I was going down to supper.
Q. It was before sundown?
A. Yes, sir.
Q. At that time you say Calton was driving the team?
A. Yes, sir.
Q. Cullen in the seat with him?
A. Yes, sir.
Q. What was Tiberty's condition?
A. He was running along; didn't stagger; I thought he was pretty straight.
Q. Did you see them after that?
A. No, sir.
Q. Did you see them drive out of town?

A. No, sir.

30 Q. Did you see that team again that afternoon?

A. I saw them when they came back.

Q. Where were you when they came back?

A. I was sitting in front of Hagues saloon on the platform.

Q. How long was it from the time you first saw them until you saw them come back?

A. I had just been in to supper when they were in there.

Q. And the team was driven back into town?

A. Yes, sir.

Q. Who was driving?

A. Calton.

Q. Did you see Cullen?

A. Yes, sir.

Q. Describe to the jury his position.

A. He was sitting by Calton on the seat leaning back.

Q. Back on the ore sacks?

A. Right over the seat, over a lazy board.

Q. Did you notice what position his feet were in?

A. Kind of bent down toward the dashboard.

Q. Where was Tiberty?

A. He was laying on his belly in the hind end of the wagon.

Q. Where was the team driven to?

A. In front of Campbell's store.

Q. And stopped there?

A. Yes, sir.

Q. Did you go up?

A. Yes; I started down before they stopped. I saw them coming in and I made the remark that Cullen looked like a dead man. And as they passed, Bert Timmoney says he saw some scratches on Cullen, or something; says I, "We will go down and see." Then Timoney started

31 down with me, and as we got there Calton had dropped the line out of his left hand, and the team started up, and he pulled up with his right hand, and Timmoney went around and stopped them. Tiberty had got out of the wagon by this time. When I got there Calton was sitting in the seat, and he started to get out; I asked him what was the matter, and he said "Mike." Said he, "I shot Mike—shot him and shot him after he was dead." Then he jumped out.

Q. Did he fall when he jumped?

A. No, sir; I asked him where his gun was and he said it was in the wagon, and he went to take it out. I told him to never mind, I would get it; and I went and got it.

Q. Was the pistol in a scabbard at the time?

A. In a scabbard.

Q. And you say Calton told you where it was, and started to get it?

A. Yes, sir.

Q. Did you notice how many of the chambers had been discharged at that time?

A. No, sir; I just took the pistol out; and I saw Baldwin at the other side of the wagon, and I told him he had better take Calton in custody, and I gave him the pistol.

Q. Did you examine the pistol at the time?

A. No, sir; I saw it afterwards; Baldwin said it was the pistol. I noticed it when I took it out of the wagon.

Q. Can you say whether it was a pistol like that?

A. Yes, sir.

Q. What calibre is that?

A. 44 or 45.

Q. Can't you tell; is there no mark on it? There generally is a mark on them, but I can't find one on that.

A. They generally have it on. I don't see any mark on it. I
32 am pretty sure that is the pistol, because McGarry had one like it, and he was showing it to me and I noticed it was like it at the time.

Q. Did you hear the defendant say anything further about this homicide that night, at any time make any further reference to it?

A. At that time Campbell came up and I went off to hunt some place to put the body; and I left them all there and went over to Mowrey's and asked Mowrey if I could get a place to put Cullen to be fixed. Mowrey said I could have that place. Dock Hague got into the wagon and drove it up to Mowrey's, and he drove the opposite side up to the door to which Cullen was on. Cullen was on the opposite side of the wagon from the door. And I told him to bring the nigh side around to the door so we could get him out better, and he did. We put him on some benches and boards in the room there.

Q. Well, did you hear the defendant say anything about this killing then?

A. I don't remember hearing him say anything.

Q. Did he meet Campbell and say anything to him?

A. I don't remember.

Q. Was you in the dining-room when Campbell came in?

A. No, sir.

Q. Did you hear him say anything—did you hear him make any statement the next morning about it?

A. Only when he was before the magistrate.

Q. What did you hear him say there?

A. He said that he had killed him, and killed him in self-defense. He said he had killed him; and somebody asked him why he killed him, and he said he killed him in self-defense.

Q. Did you assist in dressing the body?

A. I was one of the coroner's jury. I cut the clothes off him and examined the body?

Q. You say you cut the clothes off him?

33 A. Yes, sir.

Q. Were you one of the jurors?

A. Yes, sir.

Q. Describe to the jury what, if any, wounds you found on the body?

A. Discovered nine holes in the body.

Q. Stand up and point out to the jury on my person where they were.

A. There was one in here, on the right-hand side, about that high, came out here; and there was one hole right here in the arm.

Q. Did you notice—did you move the arm?

A. Yes, sir; the arm was broken.
Q. Whereabouts?
A. Right in there. [Indicating.] And then another here; another about there; bullet hole here; one in this side, and another on that side. That is all the bullet marks I saw on him.
Q. When was the inquest held, that same evening?
A. It was held in the morning about three o'clock.
Q. Who remained with the body that night?
A. George Williams, Dock Hague, and Dan Smithson.
Q. I mean the night after the killing?
A. That same night.
Q. When was the body washed?
A. Next morning.
Q. Did you assist in that?
A. No, sir; I was sitting on the jury at the time.
Q. Were you present right after?
A. I helped dress him and also shaved him.
Q. Do you remember seeing any bruises other than these wounds you have described?
A. There was a bruise on the left side of his neck. It looked
34 like a finger print. I didn't notice it when I examined him, but when I was shaving him I noticed it.
Q. Had you before looked for anything of the kind?
A. No, sir.
Q. You saw it when you shaved him?
A. Yes, sir; it was kind of black and bruised.
Q. It had that appearance, as though it might have been done with the finger?
A. Yes, sir.
Q. When you got the body dressed what was done with it?
A. It was put into a box.
Q. Was you present at the time?
A. Yes, sir; there was ice put in the box, packed in the box, and moved over to the forwarding department, over to Snow's forwarding house, where there had been——
DICKSON. Never mind about that.
Q. Was you present when the box was closed for shipment?
A. Yes, sir.
Q. Where was it taken to from there?
A. The depot.
Q. And from there?
A. Salt Lake.
Q. Did you accompany the body?
A. Yes, sir.
Q. Did you go up in the same car with it?
A. Yes, sir; I was in and out all the time. As soon as—we would have to keep wetting the face with carbolic acid.
Q. Was you with the body when it was changed from one train to another at Juab?
A. Yes, sir.
Q. And went up in the car with it from there?

35 A. Yes, sir.

Q. When you got to Salt Lake what was done with the body?

A. It was taken up to the undertaker's.

Q. What undertaker's?

A. Taylor's.

Q. Did you go up?

A. Yes, sir.

Q. Do you remember what day of the week it was when the homicide was committed?

A. No; I don't.

Q. How many days after the homicide was it that you started for Salt Lake with the body?

A. I think it was the next day—next evening.

Q. And then you got to Salt Lake the following morning?

A. Yes, sir; about 10 o'clock.

Q. And took the body right to the undertaker's that day?

A. Yes, sir.

Q. Was you present at the post-mortem examination when the examination was made by Dr. Fowler?

A. Yes, sir.

Q. When was that?

A. Three days after the arrival.

Q. Made by Dr. Fowler?

A. Yes, sir.

Q. You saw the body stripped there and the examination made by the physicians?

A. Yes, sir.

Q. Observe these same wounds that you have spoken of?

A. Yes, sir.

Q. Just see if these are the clothes that Mr. Cullen had on, and point out, if you can, the bullet holes in them.

36 (Mr. Dickson hands clothes to witness.)

A. We had to cut these off. Here is one, there is one.

Q. Did you examine that coat at the time you stripped him to see if it were powder-burned?

A. This place looked like it was powder-burned. That bullet [showing] didn't come out; it lodged in his arm.

Q. Is the vest there?

A. I don't know whether he had a vest on or not.

Q. Shirt?

A. The shirt is here. I don't see any vest here.

Q. The pants are there, I suppose?

A. Yes, sir.

Q. Just take them out. Point out the bullet holes.

(Witness points out the bullet holes to the jury.)

A. There is a bullet hole in here.

Q. You might exhibit the shirt to the jury, too.

(Witness exhibits shirt.)

Q. Point out the holes in it.

(Witness shows the holes in shirt to jury.)

Q. You cut that off, too?

A. Yes, sir.

Cross-examination by Mr. DENNY:

Q. You say it was about seven o'clock or shortly before seven o'clock when you first saw them?

A. Somewheres about that time. Shortly after the train came in.

Q. About half-past six?

A. Yes, sir.

Q. At that time you say Cullen and Calton were in the wagon, together, and Tiberty was on the sidewalk?

A. He was kind of running along the sidewalk, after the wagon.

Q. Did they start out of town then?

37 A. No; I met Stanley ahead of them going down to the granary.

Q. Did you see them go any place then?

A. No, sir.

Q. Did you see them going out of town?

A. I didn't see them go out of town; I guess they went out when I was eating supper.

Q. How long was it before you saw them coming back into town with the body after you first saw them?

A. Well, I was going to supper when I saw them; I went and washed, had supper, and was sitting in front of Hague's saloon on the platform. I had washed and eaten supper and had been sitting on the platform in front of Hague's I don't know how long when they came up.

Q. You don't know how long you had been sitting there?

A. No; I don't know; it was not long.

Q. Tiberty was laying down on the ore-sacks?

A. Yes, sir.

Q. On his belly?

A. Yes, sir.

Q. Did you notice any bruises on Calton?

A. I didn't notice any particularly.

Q. Did you notice any the next morning?

A. No, sir; I don't think I saw him the next morning only when he was giving his testimony before the magistrate; that is the only time I saw him.

Q. You say it was about ten or fifteen minutes. Had you been sitting out on Hague's platform ten or fifteen minutes?

A. Yes, sir; I had.

Q. Been sitting out there ten or fifteen minutes after supper?

A. I think it might have been about that; I don't know.

38 Q. You went down then and called for the pistol, and he delivered it up?

A. He went to get it for me, and I said I would get it. He showed me where it was.

Q. Then he was taken in charge by the sheriff?

A. Yes.

Q. Did he make any remarks at that time?

A. He said that he killed him. "Shot him after he was dead."

Q. Says he did it in self-defense?

A. Not at that time.

Q. When was it that he made that statement?

A. He said that when he testified before the magistrate. In his examination he was asked why he killed him. Somebody asked why he killed him, and he said he killed him in self-defense.

Q. What did he say?

A. Somebody asked why he killed him, and he said he killed him in self-defense.

Q. Didn't you state that he said Cullen made the remark that he was going to kill him?

A. No, sir.

Redirect examination by Mr. DICKSON:

Q. Was there any weapons on Cullen's person at all?

A. He had some money—silver.

Q. Any weapons?

A. He had a pocket-knife—not a knife.

Q. Any other?

A. No, sir.

Q. Have any gun?

A. No, sir.

Q. He was quite dead when you first saw the body?

39 A. He was dead when he came back to town.

Q. You recognize these as the same clothing?

A. Yes, sir; those are the same clothing. I cut them on the left arm first.

Dr. ALLEN FOWLER, having been first duly sworn, was called for the prosecution.

By Mr. DICKSON:

Q. What is your profession?

A. Physician and surgeon.

Q. You reside in Salt Lake City, in this Territory?

A. Yes, sir.

Q. Did you during the month of July, in the presence of the last witness that just left the stand, make a post-mortem examination of the body of Michael Cullen at Taylor's undertaking house?

A. Yes, sir; on the 21st of July at Joseph William Taylor's. There are two undertakers named Taylor. This was at Joseph William Taylor's.

Q. Do you recognize this witness?

A. Yes, sir; he was there.

Q. You didn't know Michael Cullen in his life-time?

A. No, sir; I was not acquainted with him. I don't think I had seen him before.

Q. Describe in detail to the jury the various wounds that you found on that body, and the examination you made as to each?

A. There was seven bullet wounds; that is, gunshot wounds on the anterior surface and sides on the body combined. One shot entered on a line with the arm-pit, the axilla, and about six inches below.

40 Q. Well, doctor, just point out on my person the location of those wounds, so the jury can see?

(Witness showing location of wounds on Mr. Dickson's person).

A. One shot entered just about six inches below the arm-pit, the axilla, at the eighth rib; passed diagonally across the body and coming out at

that point, on the seventh rib, and fracturing it; ranging upward from the eighth to the seventh. In its course it passed through a lobe of the liver, then through the stomach on to the lower lobe of the left lung—in the left lung there are but two lobes. Then it entered the arm, fracturing the arm and lodging just beneath the skin. That wound also—one thing more and then I will leave that—it passed through the large vein, the vena cave; passed first through the liver, and after it next passed through the cavity of the stomach; then through the vena cave.

Q. How large a vein is that, doctor?

A. The largest vein in the body; the vein which carries from the lower extremities all the blood and empties it into the heart. It cut this large vein close to the heart, where it returns the blood to the heart. Passed through the liver, the large vein, the vena cave, the cavity of the stomach; then through the lower lobe of the left lung; from there into the arm, fracturing the arm. Then there was two other wounds nearly opposite the lower portion of the breast-bone, the ensiform cartilage—the lower portion of the breast-bone is known as the ensiform cartilage. Four inches to the left of that is where one bullet entered, and about the same distance to the right another entered. Those balls ranged upwards and backward and lodged in the vicinity of the back-bone, but could not be found without cutting the body all to pieces. And having found
41 the fatal shot it was not necessary to dig into the back and hunt them.

Q. Did you determine whether or not either or both of them had ranged to the right or to the left?

A. These balls ranged upwards and backwards; and after that I didn't stop to see in what direction they were; but they seemed to go as far as we traced them through the lungs; but the lungs are so pulpy that it is difficult to trace the ball. The balls ranged upward, but I don't know where they lodged. This shot that was fired through there, passing through the liver, cutting the vena cave, was certainly fatal; as much so as though it had passed through the heart. The cutting of that large vein is the same as cutting the heart. Then there are four other wounds here. This bone in front is known as the pubis. Five inches below the pubis on the right side another ball entered and makes its exit there (witness showing location of Mr. Dickson's body), ranging forward. About four inches below the pubis another entered on this side. They passed out without fracturing either leg. Now, as to whether these four wounds were made by one bullet or two distinct shots, that depends upon the position the patient was in at the time he received them. They may have been done with one. They would have the same range as if the man stood and fired two distinct shots. They would have exactly the same range and have the exit and entrance just the same. So you see it could be done by one or two balls. If the man sat in this position one bullet would pass through, making the two. If he was sitting as one of the witnesses intimated, then there must have been two balls; and yet it would have exactly the same range. You might think at first that we could tell from the way the ball entered; yet you could not, because it en-
42 tered here, and here, beyond.

Q. There could be the two points of entrance in the same place whichever way it was?

A. Certainly.

Q. The wound you have described the course of as entering the right side and coming out of the left and entering the arm, could all three of those wounds have been made, and can you say whether they were probably made by one bullet?

A. I am satisfied, though there is a bare possibility that it may not have. I will state that they were made from one shot, from the fact that we traced the ball plainly into and through the vena cave, into the cavity of the stomach, the lower lobe of the left lung, and then it passed out. Now, then, it went somewhere. Then directly in the range of that we find the ball lodged there in the arm. If the man's arm was hanging on the left side it would certainly lodge there; but if it was in this position it would have passed through and not touched the arm. If it was hanging down by his side it certainly would not pass through and come out where it did without entering the arm. It is almost certain that it was produced by the same shot—by one shot.

Q. Could you determine by the examination made by you whether these gunshots were received in life or not?

A. Yes, sir; it is certain they were received in life. There are many reasons that might be given. One is, that the whole cavity was filled with blood. The abdominal cavity both above and below the diaphragm was filled with blood, which could not have been if it had been dead at the time the shots were fired.

Q. And the wound you have just described would not only have been fatal but instantaneously fatal?

43 A. Yes, sir.

Q. Did you notice any discoloration on the throat of that body?

A. Yes, sir; I did. My attention was called to it indirectly, and we gave it a good deal of attention. There was extravasated blood-jams or bruises with blood settled in beneath it, on both sides of the neck, just about where a man's fingers and thumb would rest.

Q. Could you determine whether that was the result of recent injury?

A. Being seven days afterward, I would not swear positively as to that. I am very certain that that extravasation must have occurred during life.

Cross-examination by Mr. DENNY:

Q. How many bullet holes did you see altogether?

A. Seven. Four in the thighs; four—let me see, there was nine altogether—four in the thighs, four here, and one here.

Q. How many shots, now, would it take to make those?

A. Well, sir, it would depend a little on the position of the patient.

Q. Could those nine have been made by two or three shots?

A. The four here might have been produced by one bullet; the three here were likely produced by one bullet. I don't say that the four in the thighs were produced by one bullet. Then one shot might have produced this here—one was most certain to have produced these three here, and two right here about; these two on the body were separate and distinct; those two right by the breast-bone were separate and distinct shots.

Q. Could either one of those produce death?

A. No, sir; not immediate death; they might produce secondary death. It was certain that death was produced by the one that

44 entered on the right side and passed through the liver, and death must have been instantaneous

JESSE BALDWIN, having been first duly sworn, was called for the prosecution.

By Mr. DICKSON:

Q. You reside at Milford?
A. No, sir.
Q. Where do you reside?
A. Beaver.
Q. You are the sheriff of this county?
A. Yes, sir.
Q. Were you in Milford on the afternoon and evening of the 14th of July last?
A. Yes, sir.
Q. Did you know Michael Cullen in his lifetime?
A. I did not.
Q. You know Andrew Calton, the defendant here?
A. I knew him as soon as I arrested him.
Q. Did you see him in Milford on the 14th of July last?
A. Yes, sir.
Q. What time in the day did you first see him?
A. I don't know exactly; I should judge it was between six and seven.
Q. In the evening?
A. Yes, sir.
Q. Where did you see him and under what circumstances at that time?
A. Well, when I first seen him he was standing by the side of a wagon at Campbell's place.
Q. Was there a dead body in the wagon then?
A. Yes, sir.
Q. Did you say that was between six and seven?
45 A. Yes, sir.
Q. Before dark, at all events?
A. Yes, sir.
Q. Was Calton in the wagon then, or standing by the side?
A. Standing by the side.
Q. When you first saw him?
A. Yes, sir.
Q. And there was then but this body in the wagon?
A. Yes, sir.
Q. Did you see Tiberty?
A. I saw McKeon; I don't recollect seeing Tiberty there at that time.
Q. There was no other but the body in the wagon at that time?
A. No, sir.
Q. Did you hear anybody say in the presence of the defendant whose body this was?
A. I heard some one say Mike was dead.
Q. Did you see the team drive up to the store?
A. No, sir.
Q. It was standing there?
A. Yes.
Q. What first attracted your attention to it?
A. Some one came in the store and said that Mike was dead; and when we came out the team was standing there at the door.

Q. And Calton by the side of it?
A. Yes, sir.
Q. Tell what you heard Calton say, if anything.
A. Well, there was quite a lot said.
Q. Anything that you heard him say.
A. When I went up to arrest him he said that is what he came for, to give himself up. Some one asked why he killed him, and
46 I don't know whether he answered me or somebody else; he said that he shot him.
Q. Was he still standing by the wagon then?
A. Yes, sir.
Q. Was he asked why he killed him then?
A. Not there, I don't think.
Q. Did you have any conversation with him about his pistol?
A. I asked him where it was.
Q. What did he say?
A. He said that it was in the wagon, and started to get it; I told him to hold on, I would get it, and I went and got it.
Q. Was it in a scabbard?
A. Yes, sir.
Q. Did you examine the pistol?
A. Yes, sir.
Q. How many chambers had been discharged?
A. It had six empty shells in it.
Q. Could you say whether that is the pistol or not [handing witness pistol]?
A. That is the one.
Q. What position was the body of Cullen in when you saw it first?
A. Well, he was sitting on the seat, laying back on the sacks.
Q. Did you notice the position of his feet?
A. No, sir; I don't know particularly. I saw his foot was laying stretched out.
Q. Did you have any further conversation with the defendant after that?
A. Yes, sir; I asked him what he shot him for.
Q. When; that same evening?
A. Yes, sir.
47 Q. How long after you first saw him?
A. Well, I think it was within twenty or thirty minutes after, if I recollect.
Q. What did he say?
A. He said he shot him because he was choking him.
Q. Did you hear him say anything further about it that day or night?
A. Well, he talked and spoke to a number of men; some of them asked him questions.
Q. Can you recollect anything that he said?
A. I heard him say three or four times that he shot him in self-defense.
Q. How soon after you first saw him was it that he said he shot him in self-defense?
A. He said that when he first spoke about shooting him.

Q. That was at the wagon?
A. Yes, sir.
Q. And several times you heard him say that he shot him in self-defense?
A. Yes, sir; sometimes he would say that he shot him because he was choking him, and sometimes he would say that he shot him in self-defense.
Q. Did you see him shake hands with Campbell?
A. No, sir.
Q. Did you hear the defendant make any remark to Dock Hague?
A. Yes, sir.
Q. Was that while the wagon was standing in front of the store?
A. Yes, sir.
Q. What did you hear him say?
A. I heard him say, "Here is your partner; I shot him."
Q. Anything further?
48 A. I don't know; he talked so—talked about anything and to anyone. I heard that spoken when I first came up.

Cross-examination by Mr. DENNY:

Q. What condition was Calton in when you saw him?
A. In what respect?
Q. State whether or not he had been drinking.
A. I should judge that both of them was pretty tight.
Q. How was Tiberty?
A. They both acted to me like they was drunk.
Q. From their conversation could you notice it upon them?
A. Yes, sir; I thought so.
Q. What was the condition of Calton; was there any scars on him or any blood, or anything of that kind?
A. Yes; he had scars on his face.
Q. Whereabouts?
A. He had one scar under this eye—a red and blue place. And he had a scar, I think, on his right jaw; it was bloody—a kind of cut place. He also had some on his neck.
Q. Was his neck discolored?
A. Well, it was little marks in one or two places—little blue marks.
Q. In answering the question as to why he shot him you stated he said because he was choking him.
A. Yes, sir; he said he was choking him—struck him.
Q. And that he did that in self-defense?
A. Yes, sir.
Q. How long did you remain out on the sidewalk; out by the wagon?
A. Oh, we stood around there, I should judge, twenty or thirty
49 minutes in the street.
Q. And then you took Calton in charge from there?
A. Yes, sir; I had him in charge while I was standing there.
Q. Did you examine the pistol at that time to see whether or not it had the appearance of being freshly fired off?
A. I examined it and saw six empty shells in it; I could not tell how long it had been fired off.

Redirect examination by Mr. DICKSON:

Q. Did you assist in taking the clothing from Cullen's body?

A. No, sir.

Q. About these scars you speak of on the person of Calton, describe the scar that you say was here on the left side.

A. Well, it was across this way——

Q. Turn so the jury can see you.

A. If I recollect right, it might have under the right eye; but the mark on the eye was on the opposite side from the mark on the jaw.

Q. About how large was it?

A. I should judge about an inch long.

Q. How wide?

A. Probably an eighth of an inch.

Q. What was its color?

A. A reddish-blue color.

Q. It was a reddish blue when you saw it?

A. It was between a blue and a red.

Q. Between a blue and a green-greenish cast, wasn't it?

A. No; it was——

Q. Was there not a greenish shade in it?

A. I didn't notice; it looked kind of a dark color. I didn't look in it particularly to see what kind of a mark it was.

50 Q. Red, or blue, or both?

A. Kind of a red color—bluish-red—what I would call a bluish-red.

Q. How soon did you first see that?

A. When I first arrested him.

Q. Was the skin broken?

A. Yes, sir; I think it was on that side. (Showing on his own face.)

Q. Any blood on that side?

A. No, sir; I never noticed any.

Q. Who called your attention to it?

A. Nobody.

Q. Did the defendant say anything—call your attention to any of these?

A. No, sir.

Q. Did he point out the one on his throat to you?

A. No, sir; he showed me after he got here.

Q. Did he that evening to somebody else in your presence?

A. Not that I know of; not that I recollect.

Q. Now this scar on this side, describe that.

A. That was a long mark.

Q. About how long?

A. Well, the blood showed, I should judge, three inches.

Q. The blood showed—the blood might have been longer than the cut, mightn't it?

A. Yes; the blood run down.

Q. How long was the scar, if you know?

A. I don't think the scar, if it was washed, was more than an inch.

51 Q. Did you see it after it was washed off?

A. About an inch.

Q. How wide was it? Did it look as though it might have been done with a finger nail?
A. It might have been done with a nail; I could not tell.
Q. Had that appearance?
A. Yes, sir.
Q. Wasn't a deep cut?
A. No, sir.
Q. Was not very much blood flowing from it?
A. No, sir; not a great deal; it was running on his face a little.
Q. What about the marks on the throat?
A. I saw two or three scratched places.
Q. Where?
A. Along on this side of the neck.
Q. Were they black and blue?
A. Dark; just broke the skin in one or two places.
Q. How large?
A. Oh, probably half the size—looked like that might have been made with the end of the finger.
Q. Blood flow from that?
A. No, sir.
Q. Did you notice all those that same evening, the same time?
A. I didn't notice that on his neck just then.
Q. Was you examining him for marks at that time?
A. What made me look, I heard him say he felt choked, and then I looked around.
Q. Make any more than one examination?
52 A. I didn't take hold of him.
Q. How near was you to him?
A. As near as from here to the stand.
Q. Just cast your eye over?
A. Yes, sir.

JOSEPH HAGUE, having been first duly sworn, was called for the prosecution.

By Mr. DICKSON:

Q. What is your full name?
A. Joseph Hague.
Q. Live at Milford?
A. Yes, sir.
Q. Live there on the 14th of July last?
A. Yes, sir.
Q. Keep a saloon there at that time?
A. Yes, sir.
Q. Did you know Michael Cullen in his lifetime?
A. Yes, sir.
Q. Know the defendant, Andrew Calton?
A. Yes, sir.
Q. Know Jerry Tiberty?
A. Yes, sir.
Q. Did you see these men at Milford on the afternoon of the 14th day of July last?
A. Yes, sir.

Q. Were they in your saloon immediately before leaving town that day?

A. They were in my place before they did leave.

Q. Who came in first?

A. Cullen.

53 Q. What was his condition?

A. Pretty full.

Q. Stagger?

A. Little.

Q. How long after he came in on that occassion before the defendant and Tiberty came in?

A. About three or four minutes.

Q. Came in together about?

A. Yes, sir.

Q. Just tell what was going on at the time they came in.

A. Mr. Tiberty came in and says, "Let's go home, Mike, it is time to go home." He says, "All right, I will go just as soon as I get a drink;" and he got a drink and then he said he wanted a bottle, and I told him he had enough, and I would not let him have any more. He said he would go down the street and get some. I said all right, and they went out, got in the wagon, and drove off.

Q. Did Cullen pay you for the drink?

A. Yes, sir; he threw down a dollar. There was seven of us drank. He said give me a half a dollar back and a pint bottle. I said I would not do it, and he went out and threw it down the street and said you can go down after that dollar.

Q. All go out together?

A. Yes, sir.

Q. What appeared to be his condition—Calton's—as to sobriety?

A. Hadn't only seen him twice that day. It was the second time he had been in the house. He didn't appear to be very drunk.

Q. Tiberty came in there and asked Cullen to go home?

A. "Time to go home," he said.

Q. When did you next see Calton, if at all?

54 A. I seen him as I went over there to the house for supper, as they were going out of town.

Q. How long was that after they were in your saloon?

A. About ten minutes.

Q. Who was driving?

A. Calton.

Q. Did you see Tiberty?

A. He was laying on the ore sacks behind.

Q. When did you next see them?

A. I seen them next in front of the saloon as they drove by.

Q. Were you sitting in front of the saloon?

A. Yes, sir.

Q. Who was driving the team?

A. Calton.

Q. Go ahead.

A. Some one says, "Mike looks as though he was dead." We went over there; Dan Smithson went over and he came back and said, "Mike's

dead," and we both walked over. As I came up I was looking at Mike and Calton says: "There is your partner; I killed him, and I killed him good. And he said: "You refused him a bottle of whiskey." I turned around and walked away.

Q. Did you hear him make any further remark at that time?
A. No, sir; I never heard much.
Q. Was you in the dining-room where he ate his supper after that?
A. No, sir.
Q. Never heard him talk any more about it?
A. No, sir.
Q. You went up to see Cullen very soon after they stopped?
55 A. Five to ten minutes after they stopped.
Q. The body hadn't been taken away from in front of Campbell's store?
A. No, sir; they were looking for a place to put the body.
Q. Who remained with the body of Cullen that night?
A. I did; Dan Smithson and Joseph Williams.
Q. Did you see the body put in the box the next day?
A. Yes, sir.
Q. It was the same body?
A. Yes, sir.
Q. Did you assist in taking the clothes from him?
A. No, sir.
Q. Were you present?
A. No, sir; I just came in after they got the clothes off.
Q. Do you know whether or not there were any weapons on the body?
A. Never seen any.

Cross-examination by Mr. DENNY:

Q. How many times had Cullen been in your place during the day?
A. Four times.
Q. You say this was the second time that Calton came?
A. Yes, sir.
Q. Did you see him when he first came down?
A. Yes, sir.
Q. They all three came in at that time.
A. Yes, sir; and they all three had a drink.
Q. Then they had a drink in the afternoon before they started?
A. Yes, sir.
56 Q. They didn't get a bottle of liquor at your place?
A. No, sir.
Q. Now, how was Cullen's condition when he was in the second time?
A. He looked as though he had been drinking a little more.
Q. Looked as if he had several drinks?
A. Yes.
Q. When you refused them liquor do you know where they went?
A. Down the street.
Q. Did you see them when they were driving out of town?
A. Yes, sir.
Q. How long after they left your place?
A. About ten minutes, I should judge.

Redirect by Mr. DICKSON:

Q. Did Calton, when he was in the saloon there, talk rationally?

A. Yes, sir.

Q. When you saw him, after he got back with the body, did he talk rationally or irrationally?

A. Well, he was talking and laughing.

Q. What did he say?

A. Just what I told you: "There is your partner; I killed him, and I killed him good. You refused him a bottle of whiskey."

By Mr. DENNY:

Q. They appeared to be friendly during the day?

A. Yes, sir; no hard feeling between them that I know of.

JESSE BALDWIN, recalled for the prosecution.

Q. Was there anything irrational in the talk of this defendant; did he answer your questions sensibly?

57 A. I thought he talked like he was drunk and foolish.

Q. Did he answer your questions that you put to him understandingly?

A. Well, he answered as understandingly as he does any time.

Q. Did you hear him asked why he killed the man, and he answered that he did it in self-defense.

A. Yes, sir.

Q. You asked him where his pistol was and he told you and started to get it for you?

A. He said it was in the front of the wagon.

Q. And he said his answer rationally and understandingly as ever?

A. Yes, sir.

Q. But, as you say, he was more or less under the influence of liquor?

A. Yes, sir.

Q. Were you near Calton that afternoon before they drove out of town?

A. I don't know; I don't recollect seeing him. I went into Campbell's place. I might have seen him.

Q. Didn't observe him to see whether there was any scratches on his face?

A. No, sir.

Cross-examination by Mr. DENNY:

Q. You say that he answered as rationally as he ever does?

A. He has a queer way of answering any one; different from anybody else. He has a queer way of answering anybody.

Q. Did he answer in that way that indicated to you that he had a good mind?

Mr. DICKSON. We object to that unless it is for the purpose of showing insanity.

Mr. DENNY. That is the purpose of it.

58 Mr. DICKSON. All right, then; we will keep him on the stand a while longer.

Q. Now, then, when you was talking there what did you notice with reference to his mind?

A. Well, as I told you, he acted to me like he was pretty drunk or crazy.

By Mr. DICKSON:

Q. Had you ever seen him before?

A. No, sir.

Mr. DENNY. I object to that. This witness——

COURT. He can tell what he saw there.

By Mr. DENNY:

Did he act then simpler than he has been acting since?

A. No, sir; I can't say that he did.

Q. How has he acted since?

A. Well, he seemed to feel different since I have had him up here.

Q. Since you have had him in charge have you noticed anything unusual in his mind?

A. He has never acted like he was very smart at any time. I don't pretend to be a judge.

Mr. DICKSON. Did he ever act to you like an insane man?

A. He never acted very bright.

Q. Did he ever act to you as if he were an insane man?

A. No; I can't say that he did.

Q. Did he ever act to you like a man who didn't know right from wrong?

A. He showed that sometimes—sometimes he would.

Q. Tell us something that you saw him do that indicated that.

A. Well, when I first arrested him he didn't seem to know what occurred, or didn't care.

59 Q. Have you ever had much to do with criminals?

A. No, sir.

Q. Never had anything to do with desperate characters?

A. No, sir; I never had any in charge as I know of—not desperate.

Q. Now, can you tell us any more expressions made by Calton that night that indicated to you that he was not in possession of his mental faculties?

A. Well, he made his expressions——

Q. Just tell what it was.

A. In saying—that he acted the way that he acted—the way that he conducted himself.

Q. Well, take his speech first, one thing at a time. What did he say that indicated to you that he didn't know what he was saying, or that he didn't know anything that he was doing?

A. Well, he didn't seem to show any remorse.

Q. I am asking you now what he said—about what he said. What did you hear him say that evening that indicated to you that he was insane in his mind?

A. Well, it was not what he said altogether, it was the way he acted.

Q. Did you hear him say anything that night except what you have stated here; that when being asked why he killed Cullen, said that he did it in self-defense, and because he choked him; anything further than that, and talking about where his pistol was; beyond that did you hear him say anything?

A. I heard him talk a great deal; I don't recollect what he said.

Q. Do you recollect anything that he said that night?

A. I heard him say that he came to give himself up when I went to arrest him.

60 Q. When you arrested him, and he said that that is what he had come for, to give himself up, what else did you hear him say that afternoon?

A. Well, I could not relate everything that I heard him say.

Q. I am not askirg you for everything. Can you relate anything further that he said?

A. One thing that he spoke of, he said that Mike was Mat's brother; he said he didn't care if he was Mat's brother, he was not going to be choked.

Q. Anything else?

A. I don't know as I can think of anything more just now.

Q. Was there anything in all those remarks that indicated to you that he was not in possession of his mental faculties?

A. It was not so much in what he said as the way he answered.

Q. Was there anything he said that evening that indicated to you that he was not in possession of his mental faculties?

A. Yes; I would have thought he would kept still and not say anything about it.

Q. Wouldn't you say that when he said he did it in self-defense that was a pretty rational remark?

A. I should have thought he would have have kept still.

Q. Don't you think if a man committed a murder, and was called upon and was asked why he did it, and he said why he did it in self-defense, don't you think that would be a rational answer?

A. Well, I will have to admit that.

Q. You will admit that. Now, then, was there anything that he said, any remark made by that man that night, which lead you to suspect that he was not a sane man?

A. It was not from his remarks, it was the way that he brought it out more than anything.

61 Q. What was there in his conduct—what did you ever see him do—that indicated to you that he was not in possession of his mental faculties?

A. I can't describe it; it was his actions.

Q. It was his actions. That conveys no information to the jury by which they could determine his mental condition. I want you to tell the jury what his actions were, so they can have something to determine as to whether he was in possession of his mental faculties. Now, have you ever seen anything in this man's conduct—have you ever heard anything in his conversation—which lead you to believe, or even to suspect, that he was not rational? You must be able to tell the jury what it was. What was it that you ever heard him say or ever saw him do that led you to think that he was not rational in his mind?

A. I could not relate anything in particular.

Q. Could you relate anything that he did or said in part or in general that led you to suspect that he was not sound in mind?

A. Nothing but his actions; the way he spoke.

Q. What was that; when did he speak in that way?

A. All the time. He always has a peculiar——

Q. Haven't you just said that you heard him say one thing that would indicate that he was not right?

A. I don't know. From the way he speaks he acts funny to me. I never thought——

Q. Has he ever done anything since you have had him in custody that led you to suspect that he was not of sane mind?

A. I don't know.

Q. When did you first suspect it?

A. When I first arrested him.

62 Q. From what you first said here?

A. And from his actions.

Q. Haven't you told us all that he said?

A. Yes; pretty near.

Q. And it is from the way that he said it and the way that he detailed it, that leads you to think that he was not sane?

A. Yes, sir.

Q. But you can't tell us what that was. Did you think that he was insane, or that he was not a bright man?

A. I never thought he was insane, exactly.

Q. Do you think he is insane now?

A. I don't know.

Q. Do you think he is insane?

A. I don't think he is insane; he is not very bright.

Q. You have seen many men who are not very bright, haven't you?

A. Yes; I am not very bright myself.

Q. You can't give the jury any further reason for thinking that he was not very bright?

A. No; I don't think I can.

Dr. ALLEN FOWLER recalled for the prosecution.

By Mr. DICKSON:

Q. About how long after the influction of the blood, light or heavy, in a bruise, would it result in discoloration—turn a bluish color—would there be between the influction of blood to the bruise and the discoloration?

A. Certainly not sooner than four days, and perhaps a week. The first discoloration would be red and pass away. If there is no more than redness it would pass away. If there is extravasated blood beneath the skin, that is dark at first or black. And for the next stage it would be

63 may be a week; the change could not commence in less than between four or five days. As it would fade out it becomes a blue or green, from that a little lighter until nature absorbs entirely the extravasated blood.

Q. There could be no such darkness of the skin without there being extravasated blood?

A. Certainly not; I believe the limit of four days is very low; if I had said five or six days it would have been low indeed.

Cross-examination by Mr. DENNY:

Q. I understand that the skin would have been discolored in four or five days?

A. I say that where the blood has been extravasated beneath the skin,

like a blood blister—like a lick with a hammer on a nail, would cause blood to be extravasated, so that the nail would look dark. The same thing occurring beneath the skin from a bruise would cause the blood to extravasate there and make it black.

Q. How long before the change—before the black would occur?

A. It occurs after nature has absorbed the darker portion of the extravasated blood, and the next stage is its green one, or blue hue, then from that it gradually gets lighter, until the blood has all been absorbed or taken up. It is illustrated well by a black eye. For four or five days it is black, then it becomes green or blue, and then it fades out.

Q. Suppose one was choking a person, could not you see that discoloration in a very short time?

A. You could see it in little or no time after the injury.

COURT. As I understand Mr. Denny, he wants to know how soon the dark color would occur; how soon would it turn dark after the injury?

64 A. Oh, in a few minutes after the injury. It gradually grows darker for an hour or so until the blood ceases to flow beneath the skin, but it takes three or four days before nature makes any discoloration of the blood changing it to greenish or blue color.

By Mr. DICKSON:

Q. Before it would change from a black to a green?

A. Yes, sir.

A. W. MOWREY, having been first duly sworn, was called for the prosecution.

By Mr. DICKSON:

Q. What is your name?

A. A. W. Mowrey.

Q. You live at Milford?

A. Yes, sir.

Q. Keep a hotel there?

A. Yes, sir; I started on the——

Q. Never mind about that; was you keeping one on the 14th of July last?

A. Yes, sir.

Q. Do you know the defendant, Andrew Calton?

A. I do, sir.

Q. Did you know Michael Cullen in his life-time?

A. Yes, sir.

Q. Did you see Calton driving into town on the evening of the 14th of July last?

A. I did, sir.

Q. Did you see him that evening?

A. I did, sir.

Q. Where did you see him that evening?

65 A. Well, I saw him when they left the town, sir.

Q. Did you see them when they drove back?

A. They drove up to my house, and they had got up to the house when I came out. Calton was *sa*nding on the platform, and Cullen had been brought into the house. Cullen was laying——

Q. Did you hear Calton say anything about the homicide there?
A. I did, sir; after that.
Q. How long after that?
A. Perhaps half an hour or three-quarters.
Q. Whereabouts?
A. In my dining-room.
Q. What was he doing?
A. Sitting in a chair.
Q. Did he eat supper that night?
A. Yes, sir.
Q. Weyre you there while he was eating supper?
A. Yes, sir.
Q. Did he eat supper?
A. Yes, sir.
Q. What did you hear him say about the affair?
A. He said he killed him the first shot. Says he, "I thought I would put the balance of the shots in."
Q. Tell you that he killed him with the first shot?
A. Yes, sir; he said he was forced to do it.
Q. Did he say why or how he was forced to do it?
A. No, sir.
Q. And he had killed him with the first shot?
A. Yes, sir.
Q. And he thought he would put the balance in?
A. Yes, sir.
66 Q. Did you see him meet, and talk, and shake hands with any other parties there that evening?
A. I think I saw him shake hands with Mr. Stoddard.
Q. Did you hear him say anything about this matter?
A. No, sir; I was very busy at that time assisting in helping Cullen into the house, and I had other business at that time to——
Q. Did you see him the next morning?
A. Yes, sir; I took care of him that night.
Q. Did he say anything about it the next morning?
A. No, sir; not to me.
Q. To anybody else?
A. No, sir.
Q. Didn't refer to it?
A. No, sir.
Q. Did you ask him any questions about it that night?
A. I didn't, sir.
Q. Anybody else ask him anything?
A. No, sir; not in my presence. I told him this much, that I didn't want to hear him talk any more.
Q. Did he stop then?
A. Yes, sir.
Q. Didn't persist in talking about it?
A. No, sir.
Q. He seemed to answer rationally?
A. I thought he was right enough with the exception that he was intoxicated.

Q. Did he seem to know what he was talking about?
A. He seemed to know; yes, sir.

67 Cross-examination by Mr. DENNY:

Q. Had you seen him during the afternoon of that day; had you seen him around town?
A. Yes, sir.
Q. Where had you seen him?
A. I saw him out in front of Campbell's, and I think I met him in the street between my place and Campbell's.
Q. Did he appear to be very drunk at that time?
A. I didn't think he was very drunk; I thought he was just felling his liquor.

A. M. STODDARD, having been first duly sworn, was called for the prosecution.

Q. Where do you live, Mr. Stoddard?
A. Milford.
Q. What is your business?
A. Ranchman, and I keep a hotel.
Q. Were you in Milford on the evening of the 14th of July last?
A. Yes, sir.
Q. Did you see this defendant there that evening?
A. Yes, sir.
Q. Did you see the dead body of Michael Cullen there that evening?
A. Yes, sir.
Q. Did you, after seeing the dead body of Mr. Cullen, have any conversation with or meet Andrew Calton?
A. I went to the door of Mowrey's house, where the body of Cullen was lying; I looked in and saw him lying there; saw him lying there. As I looked in I saw Calton standing inside of the door. He recognized
68 me; put out his hand for me to shake hands, and he says, "I suppose you will not want to shake hands with a murderer." He went on and said that he had been insulted by different parties both in Frisco and Milford, and that he had bought a pistol with the intention of killing the next man that insulted him. I says, "I suppose you have done it now," and he says, "Yes."
Q. Says he bought a pistol with the intention of killing the next man who insulted him.
A. Yes.
Q. And you said, "I suppose you have done it now?"
A. Yes, sir.
Q. Did you have any further conversation with him?
A. No, sir.

Cross-examination by Mr. DENNY:

Q. Anybody else there at that time?
A. Well, there was several round.
Q. Who had him in charge?
A. Mr. ———, the sheriff here.
Q. Was Mr. Mowrey there?
A. I could not say; I don't think he was, hardly; I don't recollect any

person who would be about to hear what was said except Baldwin, the sheriff.

Q. Did he say that he had been insulted by different parties, and he intended to kill the next one?

A. I think that is what he said, as near as I can recollect.

Q. How long were you in there?

A. I was not in there more than a minute. I was waiting there.

P. B. McKEON, recalled for the prosecution.

By Mr. DICKSON:

69 Q. Were you present on the evening of the 14th of July, when the defendant met A. J. Campbell; did you see him shake hands with Mr. Campbell?

A. I didn't see him; I don't remember that I do.

Q. Did you see him talk with Campbell?

A. Yes, sir.

Q. Did you hear him say anything about this matter?

A. No, sir.

Mr. DICKSON. That is the case of the prosecution.

Court admonishes jury. Officers sworn to take charge of the jury.

SATURDAY, *September 24th*, 1887, 10 a. m.

Jury called; all present.

COURT. Gentlemen, Dr. Wincelow said he wanted to speak with one of the jurors that he had under treatment in regard to the effect of some medicine. Have you any objections to that?

CHRISTIAN. No, sir; we have no objection.

Mr. DICKSON. No objections.

COURT. I would like to state that before counsel enter upon the arguments, I would like to have all the instructions that they want offered. I would like to have them as soon as possible, and then if you have any additional instructions when you get through with the evidence or any requests to make, I would like to have them before night, so that I may have time to consider them.

Witnesses for the defense sworn.

Mr. DENNY. If the court please, we have no statement to make to the jury.

A. J. LEWIS, being first duly sworn, was called for the defense.

Examined by Mr. DENNY:

Q. Where do you reside?

70 A. In Star district, sir.

Q. How long have you resided there?

A. Well, I have been there on and off for three years.

Q. What is your business?

A. Miner.

Q. Acquainted with the defendant here, Andrew Calton?

A. Yes, sir.

Q. How long have you known him?

A. I have known him four years at least.

Q. Have you known him at any other place besides Star?
A. I have known him at Frisco.
Q. Any other place besides Beaver County?
A. Yes.
Q. I say, have you known him at any other place besides Beaver County?
A. No, sir.
Q. State whether you know what his reputation is in that community for being a peaceable and quiet citizen?
A. I never knew what his reputation——
Q. His general reputation?
A. He has been known to be very quiet.
Q. State whether or not you know what his reputation has been?
A. His reputation has been good, so far as I know.
Q. Have you ever stopped with him—have you ever worked with him in the mines?
A. Yes, sir.
Q. State whether or not you have known any peculiarities of his mind—its condition?

A. Well, he is very peculiar at times; at times he seemed to be
71 all right, at least seemed to be; at other times he would all at once kind of get off. We used to say that he would take a fit. He would speak to nobody for two or three days sometimes. He would not even answer if you asked him a question of any kind; and he would be that way sometimes for three or four days, and then he would come around all right in a few days as good natured as ever.

Q. State how it was with reference to taking his meals?
A. I have known him to be part of two days without going down to take his meals in that condition.
Q. Where would he be during these conditions?
A. He would stop in the bunk-house that we had near the mine.

Cross-examination by Mr. DICKSON:

Q. How long have you known Andrew Calton?
A. I have known him for four years at least.
Q. In Frisco and Star?
A. Yes; around Beaver County here.
Q. Work in the same mines with him?
A. Yes, sir.
Q. Been on friendly terms with him?
A. Yes, sir.
Q. You and he pretty good friends?
A. Not very intimate, but always been on pretty good terms.
Q. And you say his general reputation for peace and quietness has always been good?
A. Yes, sir; at least so far as I know him.
Q. Who did you ever hear speak of him as being a quiet, peaceable man?
A. Oh, everybody.
Q. What brought it up?

72 A. Oh, because he would not resent abuse from anybody.
Q. When did you ever know him to be abused and not resent it?
A. Well, I think I have abused him a little myself.

Q. I thought you and he had always been good friends?
A. We have been.
Q. Has he ever done anything disagreeable to you?
A. Yes; in these fits that he had.
Q. What did he do that was mean or disagreeable to you?
A. I would ask him some questions and he would not answer.
Q. Then you abused him?
A. Yes; I told him what I thought of him.
Q. How did you abuse him?
A. I could not exactly remember the very words I used.
Q. Give us the substance of any kind of abuse towards him. You say that he would not resent abuse. I would like to know what the abuse was.
A. I abused him because he would not answer me.
Q. How?
A. I told him that he was a fool, or a damn fool, or something of that kind.
Q. Something like that?
A. Yes.
Q. Who else did you ever know of abusing him?
A. I have known Mr. Foristor.
Q. How did he abuse him?
A. It is about three years ago.
Q. Where is that, in Frisco?
A. In Star, at the Red Warrior mine.
73 Q. How was it that he abused him?
A. In the same way.
Q. Call him a fool?
A. Well, may be more than that.
Q. What did he do?
A. I could not remember exactly.
Q. All that you can remember is that he abused him?
A. Yes.
Q. How? Isn't this the fact, Mr. Lewis, that since you have known this man he has been in the habit of getting into tantrums and ugly fits occasionally for little or no cause, when he would not speak to any man for a day or two, until he got over his temper?
A. Well, yes.
Q. Got miffed at a very slight thing?
A. I never knew what he got mad over.
Q. Isn't that the reputation that he had—getting mad for some—over some little thing?
A. Everybody thought he was crazy.
Q. Did you think he was crazy?
A. Yes.
Q. How long have you thought he was crazy?
A. Ever since I have known him to take these fits.
Q. How long have you thought he was crazy?
A. I don't remember exactly.
Q. How long have you been of that opinion?
A. It must be three years, anyway.

Q. Since you first came to the conclusion that he was a crazy man?

74 A. Yes, sir.

Q. You have known him ever since that time?

A. Yes, sir.

Q. Have you entertained that opinion ever since, that he was a crazy man?

A. Yes, sir.

Q. What is his business?

A. Miming.

Q. Work from day to day right along?

A. Yes, sir.

Q. When he had these ugly fits on, he would not speak, but he would do his work, wouldn't he?

A. I knew him once that he didn't work.

Q. With the exception of that he attended to his work right along.

A. Yes, sir.

Q. And that has been so ever since you knew him, has it?

A. Yes, sir.

Q. He received the ordinary wages of a miner?

A. I believe he did.

Q. Had the ordinary work of a miner?

A. I believe so.

Q. Did his work about as well as the rest of you?

A. So far as I know.

Q. Did his work as well as any?

A. I believe he did.

Q. Now, what did you hear him say during all these three years that led you to believe that he was a crazy man?

A. Well, it was his actions as well as his language that led me to believe it.

75 Q. Take one at a time. What was it that he said that led you to think that he was crazy?

A. I can't say that I remember.

Q. Anything irrational, that indicated that his mind was wandering?

A. I could not say anything particular.

Q. Can't you say that you don't remember anything of that kind?

A. I don't remember anything of that kind just now.

Q. Do you ever remember anything of that kind—any incoherent conversation?

A. Well, yes.

Q. What was it?

A. I could not tell; I don't remember just now of any.

Q. Stop and think; take your time; think over your acquaintance with him and see if you can't call to mind one incoherent conversation that you heard this man engage in.

A. It is very hard to——

A. When he was sober in mind?

A. I never knew him any other way; that is, I never knew him when he was drunk.

Q. Ever seen him under the influence of liquor?

A. I have known him to take a drink.

Q. Have you ever known him to be under the influence of liquor?

A. I believe I did.

Q. Now, when he was duly sober, can you call to mind any incoherent conversation that you ever heard him engage in?

A. I can't remember.

Q. Now, tell us anything, in his talk during all the three years
76 that you have known him which indicated to your mind that he was crazy. You say that he worked right along day after day all the time?

A. Well, one reason for thinking that he was crazy was that a man who would take such spells as that for nothing whatever——

Q. That you have told us already. Have you not seen rational men frequently who have surly, rabid dispositions that would get sulky and bad for a day or two; men who are reasonable?

A. No; not like Calton was.

Q. I am not speaking of Calton now. Have you never seen men whom you thought was not crazy who would act mad or disagreeable for a little or nothing and afterwards come round as agreeable as ever? Have you not seen men like that?

A. Yes; I have.

Q. Isn't this what you have heard the miners say about Calton, when he was acting in these tantrums, say, "That he must be a damn fool?"

A. Yes; I have heard them say that lots of times.

Q. You didn't regard him as a lunatic?

A. Yes; at those times.

Q. Did you think he was crazy or making a fool of himself?

A. Yes, sir.

Q. Have thought he was for several years?

A. Yes, sir.

Q. Have you ever heard anybody suggest that steps should be taken to see whether he is a sane man or not?

A. No, sir.

Q. Never thought of such a thing?

A. No, sir.

Q. And the only thing that led you to think that he was crazy was that he would get mad and would not speak for a few days?

A. Well, yes; the way he acted——

77 Q. And on those occasions he would not go down where the rest of you ate?

A. Sometimes he didn't want anything to eat.

Q. Did you ever talk with him after he got over these curious fits about it?

A. No, sir.

Q. Never heard anybody else speak to him about it?

A. No.

Q. Haven't you heard of Calton being in other difficulties—known of his being quarrelsome and ugly before?

A. I have heard others say——

Q. Then his general reputation is not what you have stat*at*ed it to be. Do you know of a difficulty he had with Dan Mackintosh at Shaunty over a cabin?

A. No, sir.
Q. Never heard of that?
A. No, sir.
Q. Did you hear of a difficulty that he had with a man in Frisco, when he had a gun and they took it away from him?
A. I heard of that.
Q. When was that?
A. About three years ago.
Q. That he was hunting a man with a gun and some of the men came and took it away from him?
A. Not exactly.
Q. What was it?
A. I heard that he got into a quarrel——
Q. And he went and got a gun and started for the man?
A. Yes.
Q. And he was caught and the gun taken away from him?
A. I never heard of the gun being taken away from him.
78 Q. Did you hear that he went and got a gun and started after the man?
A. Yes, sir.
Q. Ever hear of his being in any other difficulty?
A. Not that I can remember.
Q. Search your memory a little.
A. Not that I can remember.
Q. How far is Shaunty from Star, where you were working?
A. It is in Star.
Q. How far from where you work?
A. A mile or a mile and a half.
Q. Do you know Dan Mackintosh?
A. Yes, sir.
Q. He is out of the county now?
A. I don't believe he is in the country.
Q. Did you ever hear the boys out at Star speak of the difficulty that Mackintosh and Calton had over a cabin there in Star?
A. No, sir; not until I heard it here on the stand yesterday.
Q. I don't think you heard it here on the stand yesterday. Q. How long had you known Calton when you heard of his hunting this man with a gun in Frisco?
A. I can't remember the time exactly.
Q. Now, Mr. Lewis, you having heard that this man, Calton, had a quarrel, some difficulty in Frisco, and having heard that after the quarrel he went for a gun and hunted for the man with it, do you mean to say that he was a peaceable, quiet man, and his reputation was peaceable and good; do you think it is?
A. I don't think there is any harm in him.
Q. Don't think there is any harm in him if he hunts a man
79 with a gun?
A. The way I heard it he didn't offer to hunt a man with a gun.
Q. Didn't you hear that the gun was taken away from him?
A. No, sir.

Q. Did you think that that was the conduct of a nice, peaceable, quiet, good citizen?

A. I didn't think that he was—I don't think much about it. I thought he was crazy.

Q. Thinking that this man was crazy—deliberately getting into difficulty—and afterwards went away and hunted for a man with a gun, why didn't you take steps to confine this dangerous lunatic?

A. I didn't think there was any harm in him.

Q. Notwithstanding he was hunting a man with a six-shooter?

(No answer.)

Redirect-examination by Mr. DENNY:

Q. You have heard the miners call other men damn fools haven't you?

A. Yes, sir.

Q. Now, did the miners when they referred to him as a damn fool, apply that epithet in the same sense as they did to other men?

A. No, sir; it was the general talk around there that he was a lunatic at that time.

Q. That was generally understood when they would refer to him in that way?

A. Yes, sir.

By Mr. DICKSON:

But the only thing, so far as you know, that led you to think that he was a lunatic, was that he would take spells, and not speak for some time?

A. Yes, sir.

80 O. S. CARVER, having been first duly sworn, was called for the defense.

By Mr. DENNY:

Q. Where do you reside?

A. Frisco.

Q. How long have you resided there?

A. About two years.

Q. What is your occupation or business?

A. Livery stable keeper at the present time.

Q. Do you hold any official position there now?

A. No, sir.

Q. Did you ever?

A. Yes, sir.

Q. What is that?

A. Justice of the peace.

Q. Are you acquainted with the defendant, Andrew Calton?

A. Yes, sir.

Q. How long have you known him?

A. I could not say; eight or nine years, probably.

Q. Do you know what his reputation in that community is siuce you have known him, as to being a peaceable and quiet citizen?

A. He was always considered so.

Q. Well, first, do you know what his reputation is?

A. It was good so far as I know. I never known of his being in a row——

Q. Answer the question. Do you know what his reputation is?
A. I know the reputation.
Q. State what it is.
A. It was considered good.
Q. As a peaceable and law-abiding citizen?
A. Yes.
81 Q. During the time that you have known him have you noticed any peculiarities about his mind or disposition?
A. He has sullen spells once in a while.
Q. About how often?
A. I don't know; I had an idea about once in three weeks.
Q. What makes you think that they occurred about once in three weeks?
A. I cabined with him about six years ago.
Q. How long did you cabin with him?
A. Probably two or three months.
Q. During that time these spells would occur about every three weeks?
A. I think so.
Q. What was the nature of these spells?
A. He was sullen, and didn't want to talk.
Q. Anything else?
A. I noticed nothing else.
Q. Did you notice his disposition about eating—refusing to eat during these spells?
A. Well, he never refused to speak when I spoke to him, but he seemed to shun conversation.
Q. Did you notice any season for his taking these spells?
A. I did not.

Cross-examination by Mr. DICKSON:

Q. How long would these spells last?
A. Probably two or three days.
Q. Sometimes longer and sometimes shorter?
A. I could not say as to the duration of his spells.
Q. He was simply morose, sulky, disagreeable?
82 A. Well, he didn't seem to be disagreeable, only that he wanted to get out of the way by himself.
Q. Speak rationally when you spoke to him?
A. He did.
Q. Never heard anything irrational in his conversation?
A. No, sir.
Q. If you asked him a question you always received an intelligent answer?
A. I did.
Q. Nothing unusual in his conduct except that he was frequently sullen?
A. I never noticed anything.
Q. He would attend to his business at these times?
A. Yes, sir.
Q. As understandingly as ever?
A. He seemed to; I never noticed any different.
Q. Haven't you seen other men who would take sullen spells at times?

A. I think I have.
Q. It is not a very unusual thing?
A. Well, I don't think it is common.
Q. In some men it is not very uncommon for them to be more sullen at times than others?
A. Yes, sir.
Q. We are all that way to some extent?
A. To some extent.
Q. You sometimes yourself, perhaps, feel not much like talking when things don't go to suit you?
A. Yes, sir.
83 Q. How long since you knew Calton in Frisco?
A. I think it was eight or nine years.
Q. Since you last knew him there?
A. No; I have known him there——
Q. How long since he lived there at Frisco?
A. I don't think he has made his home in Frisco for may be two years.
Q. Did you ever hear of his having a difficulty in Friseo?
A. I have heard; I don't know the particulars of it.
Q. Heard of his having a difficulty there with a man and going off and getting a gun?
A. I have heard of it; I don't know any of the particulars of it.
Q. You heard of some such circumstance as that?
A. I did.
Q. How long ago was that?
A. Well, I don't know; I couldn't call it to mind.
Q. Do you remember who the man was?
A. It was Dan Mackintosh.
Q. That is about three years ago?
A. Yes.
Q. Did you ever hear of his having any other difficulty? I don't refer to the using of a gun particularly.
A. I don't know whether I did or not.
Q. What is your best recollection?
A. I think he had a difficulty, I don't know who with, or at what time.
Q. Where?
A. In Frisco. It is merely rumor with me.
Q. Those are things, though, that make up the reputation of a
84 man. Do you know of any other difficulties by hearing or rumor besides those two that you have spoken of.
A. I don't recollect of hearing but two.
Q. Was a gun used in both of these?
A. Not that I know of; I don't recollect.
Q. Didn't that, in your judgment, affect his reputation for peace and quietness in that community?
A. I don't know.
Q. Did the people continue to speak of him as a nice, quiet citizen, generally?
A. That is generally the way I spoke of him.
Q. After he went gunning after Mackintosh?
(No answer.)

Redirect examination by Mr. DENNY:

Q. What was the nature of this difficulty?

A. I don't know. If I ever heard it it has slipped my memory.

Q. Was it somebody fighting or abusing him?

A. I could not say as to that.

Q. You just heard something or other, in which his name was used in connection with it?

A. I merely heard his name in connection with the difficulty.

Q. Whether the somebody was abusing him, or he was abusing somebody, you could not say?

A. No, sir.

W. H. BURNISON, having been first duly sworn, was called for the defense.

By Mr. DENNY:

Q. Where do you reside?

A. Near Shaunty, in South Star.

Q. In this county?

A. Yes, sir.

Q. How long have you resided there?

85 A. I have been there on and off for fourteen years; but steadily, I have been there about a year, this time.

Q. What is your business?

A. I am mining.

Q. Are you acquainted with the defendant, Andrew Calton?

A. Yes, sir.

Q. How long have you known him?

A. Well, I don't hardly know. The first time that I met him that I recollect of, was about the first days of the Horn Silver, when there was a brick-yard being burned near Frisco.

Q. How many years ago was that?

A. I think it was in '77, may be later on a year or two. I can't remember when I first did meet him.

Q. How intimate has been your acquaintance with him since that time?

A. I was not intimately acquainted with him until some time after that, when he worked for me, I presume over a year—not all the time, but at different times. He worked for me about seven or eight months at one time.

Q. I will ask you if you know his reputation in the community, for being a quiet, peaceable, and law-abiding citizen?

A. Well, yes.

Q. What is that reputation?

A. Well, I always considered him——

By Mr. DICKSON. That is not answering the question. The question is, what is his reputation?

A. His reputation has been that he was a quiet, inoffensive sort of a fellow.

Q. During the times that you have been working with him and have known him, have you noticed any peculiarities in his mind or disposition?

86 A. Well, he is one of a class of fellows that we consider off his base.

Q. State what some of the peculiarities are that make you think that?

A. Well, he gets very foolish sometimes; takes sulky spells and seems to be mad—not exactly mad, but wont have anything to say without any apparent cause. We can never discover any cause. When a man would ask him sometimes a perfectly fair question he *he* would whistle instead of answering.

Q. How often do these periods occur?

A. I could not say; they occurred pretty often when he was working for me.

Q. Any regular time?

A. I never paid attention enough to notice myself; I heard the other boys——

Mr. DICKSON. Never mind that.

Mr. DENNY. Q. You paid no attention to it?

A. No.

Cross-examination by Mr. DICKSON:

Q. It didn't attract much attention as far as you are concerned?

A. Well, it disgusted me.

Q. Well, you would not get disgusted with a lunatic for some little peculiarities?

A. Yes; if he was working for you and being laid off—being an excuse and lay off, and cause me to have to get another man in his place, and a man that is not sick and nothing the matter with him except he is a lunatic, that would disgust most any man if he was working for you.

Q. But would it disgust you if he were a sick man?

87 A. It would disgust you if you seen no cause for it.

Q. You continued to employ him for eight months at one time?

A. Yes.

Q. In what capacity?

A. Mining.

Q. Attended to his work?

A. Yes.

Q. Gave him the same wages as other miners?

A. Yes, sir.

Q. And you kept him for eight months?

A. Yes, sir.

Q. Isn't this the fact, Mr. Burnison; didn't the men sometimes plague and annoy Calton, and he would get mad?

A. I think they did.

Q. And was that not the way he got sulky?

A. That undoubtedly helped.

Q. Was not that what you understood gave him the sulky spells?

A. No, sir; he had them without that.

Q. There must have been other men annoying him without you knowing it?

A. Yes; but then he would get these spells sometimes without being joked.

Q. How do you know? There might be times that the men would joke

him without your knowing it; around in the saloons when you would not be there.

A. I know that he got used rough.

Q. And he would not talk, would not be pleased——

A. He would sometimes take a joke all right.

Q. When he got in these sulky spells?

A. Oh, no.

88 Q. Was not the occasion of these sulky spells founded in the fact that the men would annoy him?

A. That was some of the time.

Q. Did you ever have him employed in any capacity other than as a miner?

A. Yes; he drove team.

Q. Where?

A. From Star to Milford.

Q. Hauling ore?

A. Yes.

Q. You trusted him to haul the ore?

A. Yes; we trusted him to haul the ore.

Q. Find any fault with as a teamster?

A. I was not around; I was not with him at all; I was sick.

Q. Did you have him employed as a teamster?

A. Yes.

Q. How long did he act in this capacity?

A. I don't know how long.

Q. About how long?

A. Perhaps two or three weeks.

Q. Did you ever see him drunk?

A. I have not seen him drink.

Q. Did you ever see him under the influence of liquor?

A. Yes, sir.

Q. Isn't it a fact that when he was under the influence of liquor he was quarrelsome?

A. I didn't hear of it.

Q. Ever hear of his being in difficulties?

A. Yes.

Q. How often?

A. Twice.

Q. Where?

89 A. Both times in Frisco.

Q. Both times with a gun?

A. No.

Q. One time with a gun?

A. One time with a gun.

Q. Did you hear of him being in a difficulty one time with a man and he started after him with a gun?

A. No; I didn't hear of the particulars of the thing; I know I heard that he had a gun.

Q. And hear of his having a gun and going after Dan Mackintosh?

A. No.

Q. At the time you heard of his having a gun, who was the man? Who was the man that he had the difficulty with?

A. Cornel.
Q. Didn't hear of hos getting after another man with a gun?
A. No.

Redirect examination by Mr. DENNY:

Q. Do you know the occasion of these difficulties; did you hear whether they were brought on by the other persons or by Mr. Calton?
A. I didn't see; I heard how they were brought on.
Mr. DICKSON. We object.
COURT. If he was aware of it himself.
Q. You spoke in your examination that they would sometimes plague him; would they not annoy him frequently?
DICKSON. We object to that.
Q. I will ask you if you know the grounds on these occasions that they would annoy him?
A. That is the grounds that I always joshed him on.

90 Mr. DICKSON:

Q. What?
A. Because we considered him simple.
Q. He got along with his work about as well as the rest of you—any ordinary miner?
A. I suppose he did; it don't require any ability for that.
Q. Well, it does require some. He did his work well?
A. Yes.

GEORGE HALL, having been first duly sworn, was called for the defense.

By Mr. DENNY:

Q. Where do you reside, Mr. Hall?
A. Frisco.
Q. How long have you resided there?
A. I have been there since last September a year ago this last time. I lived there five years previous.
Q. What is your business?
A. Miner.
Q. Where are you engaged now?
A. Horn Silver Mine.
Q. What position do you hold there?
A. Foreman.
Q. Are you acquainted with the defendant, Andrew Calton?
A. Yes, sir.
Q. How long have you known him?
A. Since '76.
Q. State whether or not you know what his reputation is in that community with reference to being a quiet, peaceable, and law-abiding citizen.
A. I never heard it questioned.
Q. Do you know what his reputation is?

91 A. I say that I never heard.
COURT. He asks if you know what his general reputation is in that community.

A. I never heard anybody say anything about the man. I don't know anything about the man only that I was acquainted with him since '76. He never worked for me, and I have never had any dealings with him any more than meeting him on the street.

Q. What has been your relationship; how often have you met him?

A. Probably once or twice a year.

Q. Do you know of his being there in Frisco—there at different times?

A. I have seen him in Frisco on several occasions.

Mr. DENNY. That is our case.

W. H. BURNISON called on rebuttal.

By Mr. DICKSON:

Q. Did you ever believe, from anything you saw of Calton, that he didn't know right from wrong; that he would not know, for instance, that it was wrong to kill a man?

A. I could not say that I do. I think that a man would have to be pretty bad off when he could not distinguish right from wrong enough to know that it was wrong to kill a man.

Q. You still think that he knows the difference between that which is right and that which is wrong?

A. I don't know; I think that he ought to.

Q. Don't you think, from what you have seen of him, that he does? Did you ever hear him say anything or see him do anything that would lead you to believe that he didn't know right from wrong?

A. Well, I am not prepared to say.

Q. Did you ever know him to do anything wrong?

92 A. Yes.

Q, What.

A. Well, he mistreated me.

Q. In what way?

A. In these sulking spells.

Q. That is no crime?

A. No.

Q. I am speaking of right and wrong in offenses against the law. Did you ever see anything in this man, in what he said or did, that indicated to you that he did not know right from wrong?

A. No; nothing as regards his committing a crime. I don't think that there is any man that is able to navigate but what——

Q. Well, that is not answering the question. Answer the question whether or no you believe from anything you saw of this man Calton, or anything you heard him say, that he didn't know right from wrong.

A. No, sir; I never saw a man that didn't know right from——

Q. I don't care for that. The question is not what you think about it.

(No answer.)

A. J. LEWIS called on rebuttal.

By Mr. DICKSON:

Q. You never saw anything in this man Calton which led you to believe that he didn't know right from wrong?

A. I could not say neither yes nor no to that question.

Q. How long have you known him?
A. Four years at least.
Q. And worked with him at times?
A. Yes, sir.
93 Q. Seen him a good deal of the time?
A. Yes, sir.
Q. And yet you mean to say that you have no belief as to whether he has the capacity to distinguish that which is right from that which is wrong?
A. I have no way to find out.
Q. Have you ever known of his doing anything that was wrong, or what would be an offense if he was a sane man?
A. I don't believe I have; I don't remember.
Q. Do you believe now, from all that you have seen of the man during all these years, that he is unable to distinguish right from wrong; that he would not know, for instance, that it was wrong to kill a man or to steal?
A. I could not tell you.
Q. Do you think that he has not capacity enough to know that it would be wrong to steal?
(No answer.)
Q. Don't you think that he has sufficient capacity to distinguish right from wrong; is not that your belief?
A. Well, I believe he could.
Q. You have no doubt about it that he knows right from wrong in that sense; that he would know that it was wrong to steal; that he would know that it was wrong to burn his neighbor's house, or to commit rape, or anything else of a criminal nature?
A. When he had those spells, I don't know anything about it.
Q. Don't you believe yourself, from all you have seen of the man, that he is capacitated to distinguish right from wrong?
A. Outside of those spells I think he has.
Q. Well, in those spells or outside those spells, did you know him to do anything wrong?
A. I don't know that I did.
94 Q. Isn't it a fact, as stated by Burnison, that sometimes these spells were occasioned by the boys annoying and vexing him?
A. It might have helped.
Q. Don't you know that it did help?
A. I could not say.
Q. Didn't it seem to help?
A. Well, I could not tell.
Q. Did you ever know of any of the boys plaguing him?
A. Yes, sir.
Q. And don't you know of his going home and not speaking to any one?
A. I never knew of his resenting anything.
Q. Haven't you known him to go home when they have vexed or annoyed him, and he would take one of these spells?
A. I can't say that I do.
Q. And would not speak—talk?
A. No, sir.
Q. Then they didn't vex him, apparently?

A. I don't know what you would call it. He always seemed to take everything good-naturedly.

Q. He always seemed vexed and annoyed when he was not annoyed, but when he was annoyed he would go home and have one of these sullen spells?

(No answer.)

O. S. CARVER called on rebuttal.

By Mr. DICKSON:

Q. Did you ever see anything in this man, Calton, during all the years that you have known him, that led you to believe that he hadn't capacity to distinguish right from wrong?

95 A. I never saw anything that led me to that belief.

Q. You do, now, believe that he knows right from wrong?

A. I do.

Cross-examination by Mr. DENNY:

Q. How would it be when he had these curious spells—how would it be then?

A. Simply morose and sullen.

Q. Do you think when he had those spells he knew right from wrong?

A. I never seen him do anything during these spells.

Q. Did he seem, from his general talk, as though he knew right from wrong? Did he seem to understand right from wrong then?

A. Yes, sir.

DENNY. That is all.

DICKSON. We rest.

DENNY. We rest.

Mr. Zane argues.

Court admonishes jury.

Officers sworn to take charge of the jury.

Court adjourned till 2 o'clock.

TWO O'CLOCK, P. M.

Jury called; all present.

Mr. Christian argues.

Mr. Denny argues.

Mr. Dickson argues.

Jury admonished by the court. Recess till 7 o'clock p. m.

96 7 O'CLOCK, P. M.

Jury called; all present.

Charge of the court to the jury.

No. 1. Gentlemen of the jury: You have heard the evidence in this case, and also the arguments of counsel both for the people and the defendant.

It now becomes my duty to declare to you the law applicable to the case. The defendant, Andrew Calton, is accused in the indictment with the crime of murder, alleged to have been committed by him on the 14th day of July, of this year 1887, at Milford, in the County of Beaver, in this judicial district and in this Territory, by shooting one Michael Cullen with a pistol; and by means of the shooting inflicted a mortal wound upon the body of said Cullen, of which wound said Cullen did instantly die.

The particulars of the charge are fully set forth in the indictment. To this charge the defendant has pleaded not guilty. This plea puts in issue every material allegation of the indictment, and places the burden of proof upon the prosecution to make out its case in manner and form as charged.

No. 2. The defendant is presumed to be innocent until the contrary is proved, and if you have a reasonable doubt from the evidence whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal. A reasonable doubt is such a doubt as naturally arises in the minds of reasonable men, such as you are, who have been selected to try this case, because you are reasonable men. It is not a mere possible doubt, but is that state of the case which, after the entire comparison and con-
97 sideration of all the evidence, leaves the minds of the jurors in such a condition that they can not say that they feel an abiding conviction to a moral certainty of the truth of the charge. Proof beyond the possibility of a doubt is not required.

No. 3. If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of the offense charged, but you have a reasonable doubt in what degree he is guilty, you can convict him of the lowest degree only.

No. 4. In the consideration of the case you are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. These matters are left entirely with you. The court passes only upon the law.

No. 5. Our statutes define murder to be the unlawful killing of a human being, with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned or malignant heart.

No. 6. There are two degrees of murder; and if you should find the defendant guilty of murder, your verdict must show whether it was murder in the first degree or murder in the second degree.

No. 7. If you believe from the evidence, beyond a reasonable doubt, that the defendant at the time and place alleged in the indictment, wilfully, deliberately, maliciously, premeditatedly, and unlawfully shot and killed the deceased, Michael Cullen, in manner charged in the indictment, then your verdict should be that the defendant is guilty of murder in the first degree; otherwise, that he is not guilty of murder in the first degree.

98 No. 9. If you believe from the evidence beyond a reasonable doubt that the defendant, at the time and place specified in the indictment, did wilfully, unlawfully, maliciously, but without deliberation or premeditation, shoot and kill said Cullen in manner and form as charged in the indictment, your verdict should be that the defendant is guilty of murder in the second degree.

No. 10. The distinction between the two degrees of murder, so far as applicable to this case, is, that murder of the first degree, the killing must be deliberate and premeditated; whilst in murder of the second degree the killing is not deliberate or premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given to take life. In the other case, there is no deliberation, premeditation, or

preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice. The word unlawful means without right, without excuse, in violation of law and against law. The word "wilful" or "wilfully," when applied to the intent with which the act was done, simply implies a purpose or willingness to commit the act. The act must be intentional and not accidental.

The word "deliberate," as applied to killing in this case, means a cool state of blood, a state of mind contradistinguished from heat or sudden passion, caused by great provocation. It does not necessarily include within its import a brooding over or reflecting upon for any considerable length of time; but it means an intent to kill, executed by the party not under the influence of a violent passion, suddenly aroused, amounting to a dethronement of reason; but in a furtherance of a formed design
99 to gratify a feeling of revenge, or to accomplish some other unlawful purpose. The word "malice" or "malicious" imports a wish to vex, annoy, or injure another person, established either by proof or presumption of law. The word "premeditated" means thought of beforehand, for any length of time, however short. There need be no appreciable space of time between the forming of the intention to kill and the act of killing. They may be as instantaneous as the successive thoughts of the mind.

No. 11. The indictment charges that which is murder in the first degree. Such indictment includes not only murder in the first and second degrees, but also manslaughter. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds. First, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act not amounting to felony. Or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection.

No. 12. You will perceive from what I have said that in murder the killing must be with malice. In manslaughter malice is not present.

No. 13. If the commission of homicide by defendant is proven to your satisfaction and beyond a reasonable doubt, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifitable or excusable.

No. 14. If you should find the defendant guilty of murder, you should in your verdict state the degree; or if guilty of manslaughter, you
100 in your verdict should state the kind. If you find the defendant not guilty, your verdict should so state.

No. 15. If you believe from the evidence that the defendant killed the deceased, and that the defendant at the time of killing was of sound mind and discretion, then the intent with which the killing was done is manifested by the circumstances connected with the offense, and by such sound mind and discretion. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

No. 16. To convict the defendant of any crime, the prosecution must not only prove every fact necessary and essential to make out the guilt of the defendant, but show that the facts proved are not only consistent with his guilt, but inconsistent with his innocence.

No. 17. If you believe from the evidence that the deceased assaulted the defendant in a violent manner, and in such a way that the defendant had good reason to believe, and did believe that he was either in danger of losing his life or of receiving great bodily injury, he was justified in taking the life of the deceased, although in fact the defendant was in no danger. But although you believe from the evidence that the deceased assaulted the defendant in a violent manner, but not in a way that defendant had good reason to believe that he was in danger of losing his life or of receiving great bodily injury, then the defendant was not justified in taking the life of the deceased.

No. 18. I will read to you the sections of the statute which refer to excusable and justifiable homicide. Very much of this section probably would be unnecessary to read as some of it does not apply directly
101 to this case, but as it is so interwoven that I will just read it clear through.

No. 19. "Homicide is excusable in the following cases:

"First. When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent."

No. 20. "Second. When committed by accident or misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapons used, and when the killing is not done in a cruel or unusual manner."

No. 21. "Homicide is also justifiable when committed by any person in either of the following cases:

"First. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or

"Second. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends or endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or

"Third. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any
102 further struggle before the homicide was committed; or in a sudden heat of passion caused by the attempt of any such offender to commit a rape upon his wife, daughter, sister, mother, or other female relation or dependent, or to defile the same, or when the defilement has actually been committed; or

"Fourth: When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed or in lawfully suppressing any riot or in lawfully keeping and preserving the peace."

The section of the statute which immediately follows that is as follows:

"A bare fear of the commission of any of the offenses mentioned in sub-

divisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fear of a reasonable person, and the party killing must have acted wholly under the influence of such fear.

"The homicide appearing to be justifiable or excusable, the person indicated must, upon his trial, be fully acquitted and discharged."

This charge and all the instructions which I shall read to you are to be taken and considered together.

No. 22. In every crime or public offense there must exist a union or joint operation of act and intent of criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics or afflicted with insanity.

103 No. 23. Good character of a person charged with crime is a fact, when proven in the case, to be considered by the jury, with all the other facts and circumstances proven in the case, with the view of ascertaining whether he would be likely to commit the crime alleged against him.

No. 24. If you believe from the evidence beyond a reasonable doubt that the defendant and the deceased were engaged in a dispute and scuffle without weapons, upon separating by mutual consent, one seized a gun and slays the other there, if the slayer was not impelled to inflict the mortal wound through heat of irresistible passion, engendered by the quarrel, but was actuated by malice aforethought, he is guilty of murder; and if the killing was not only malicious but was wilful, that is to say intentional, and deliberate and premeditated, he is guilty of murder in the first degree. In determining whether or not the homicide was malicious, wilful, deliberate, and premeditated, the jury should take into consideration the character of the weapon used, whether deadly or not, the manner of its use, the language and conduct of the accused at the time of the killing and immediately before and after the killing, and all circumstances and evidence in the case.

No. 25. Drunkenness is not an excuse for crime, but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of the crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary.

104 The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication if such there be. Not upon the ground that drunkenness renders a criminal act less criminal, or can be used in extenuation or excuse; but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

No. 26. It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime, for when a crime is committed by a party in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such a crime. I may, therefore, charge you that mere voluntary intoxication will not reduce a criminal homicide below the grade of murder in the second degree. But to constitute some crimes it is essential that the accused should have been actuated by a special intent or purpose; for instance, to constitute murder of the first degree it is essential that the killing be not only malicious but wilful, deliberate, and premeditated. Now, for the purpose of determining whether the homicide was wilful, deliberate, and premeditated it is necessary to inquire into the state of mind under which the party committed it, and in the prosecution of such inquiry his condition as to being drunk or sober is proper to be considered. A man may be drunk, and yet not so drunk as to render
105 him incapable of acting wilfully, deliberately, and premeditatedly, and when, notwithstanding his intoxication, he is capable of so acting, and does so act, he is equally responsible for his acts as though he was sober. The weight to be given drunkenness in determining the degree of the crime is for the jury, and it is sufficient for the court to say to the jury that it should be received with caution and carefully examined in connection with all the circumstances and evidence in the case.

No. 27. To reduce a homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender uncontrollable passion in any ordinary man, will suffice. And again, no matter how serious the provocation, if it does not in fact occasion heat of passion on the part of the accused, if he is impelled to inflict the wound by malice and not by passion resulting from provocation, or in necessary self-defense, he is guilty of murder; and if the killing was wilful, that is to say intentional, and was deliberate and premeditated as well as with malice aforethought, he is guilty of murder in the first degree.

No. 28. When insanity is relied upon as a defense to a criminal charge, the burden is upon the defendant to establish it, unless the evidence upon the part of the prosecution tends to establish it. The test of responsibility for a criminal act, when unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and
106 wrong at the time of, and with respect to, the act which is the subject of inquiry.

I believe there is nothing further.

107 I hereby certify that the foregoing is a full, true, and correct transcript of the testimony and charge of the court in the case of The People of the Territory of Utah vs. Andrew Calton.

W. L. COOK,
Official Reporter, 2nd Dist. Court, Utah.

BEAVER CITY, UTAH,
October 26th, 1887.

108 In the second judicial district court, Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH, PLAINTIFF,
vs.
ANDREW CALTON, DEFENDANT.

On the 29th day of September, 1887, before judgment, the defendant moved the court to set aside and vacate the verdict herein and for a new trial, on the following grounds, to wit:

First. That the court misdirected the jury in matters of law, and erred in the decisions of questions of law arising during the course of the trial.

Second. That the verdict is contrary to law and evidence.

That after argument the said motion was by the court overruled, to which the defendant then and there duly excepted.

That the court erred in giving the following instructions, on page 109 of reporter's transcript, beginning with the words, "But although you believe from the evidence," down to the words "In taking the life of deceased;" being last of instruction No. 17.

The court erred in giving instruction marked "24," on page 112, on transcript and of this bill.

The court erred in giving instruction No. 26, on page 113 and 114, of transcript of reporter, and of this bill of exceptions.

The court erred in giving instruction No. 27, on page 114 of transcript of reporter, and of this bill of exceptions.

The court erred in giving instruction No. 28, on page 115 of transcript of reporter, and of this bill.

109 The court erred in giving all its instructions given on its own motion.

The court in giving all the instructions asked by the prosecution.

The court erred in refusing to give the instructions asked by the defendant, and marked "Refused," Nos. 1, 2, 3, 4, 5, and 6.

The court erred in giving all the instructions not asked for by the defense.

The evidence is insufficient in this, that it did not show that there was any deliberation or premeditation in the killing of said Cullen.

2. That the same was done, if at all, in the heat of passion, and not in cold blood.

3. That there was no time for reflection or deliberation.

4. That the defendant was not of sound mind and discretion.

5. That the evidence showed that at the time of the shooting defendant and deceased were both drunk; that they had a quarrel; that defendant had good reason to believe that deceased could and would do him great bodily injury if he did not prevent it; that defendant was of unsound mind, and, under the circumstances, was not capable of reflecting or deliberating as to his acts.

6. That the evidence fails to show that there was any malice on the part of the defendant.

The full transcript of the reporter's notes taken on above-named trial, including all the testimony of all the witnesses and the complete charge given by the court, are hereto attached and made a part of this bill of exceptions.

PRESLEY DENNY and J. W. CHRISTIAN,
Att'ys for Def't.

110 THE TERRITORY, &c.,
vs.
ANDREW CALTON.

The foregoing bill of exceptions in The People vs. Calton has been examined, and is full and correct, and is hereby settled and allowed.

December 24th, 1887.

(Signed) JACOB S. BOREMAN, *Judge.*

In the second judicial district court, Territory of Utah.

THE PEOPLE, &c.,
vs.
ANDREW CALTON.

Due service for the settlement of the bill of exceptions is hereby admitted, and the foregoing bill of exceptions has been examined by me, is correct, and has been prepared and filed within the time and extensions of time allowed by tha judge of the second district court.

Beaver, Utah, December 24th, A. D. 1887.

CHARLES W. ZANE,
Ass't U. S. Att'y.

111 TERRITORY OF UTAH,
County of Beaver, ss:

I, the undersigned clerk of the second judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original bill of exceptions in the foregoing entitled action, as the same appears on file in my office.

Witness my hand and the seal of said court, at Beaver City, this 28th day of December, A. D. 1887.

[SEAL.]

J. R. WILKINS, *Clerk,*
By JNO. BARRACLOUGH,
Deputy Clerk.

112 *Notice of appeal.*

In the second judicial district court, Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
ANDREW CALTON.

To W. S. Peters, U. S. att'y for Utah, and Charles W. Zane, assistant U. S. att'y:

You will take notice that the defendant in the above-entitled action, Andrew Calton, hereby appeals to the supreme court of the Territory of Utah from the judgment of conviction of murder made and entered in the second judicial district court of the Territory of Utah, on the 29th day of September, A. D. 1887, whereby the defendant was adjudged to be shot on the 26th day of November, 1887.

PRESLEY DENNY,
JOHN W. CHRISTIAN,
Att'ys for Def't.

TERRITORY OF UTAH,
County of Beaver, ss:

I, the undersigned clerk of the second judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original notice of appeal in the foregoing entitled action, as the same appears of file in my office.

Witness my hand and the seal of said court, at Beaver City, this 5th day of January, A. D. 1888.

J. R. WILKINS, *Clerk*,
By JNO. BARRACLOUGH,
Deputy Clerk.

112*a* (Indorsed:) In the second district court. The People of the Territory of Utah vs. Andrew Calton. Notice of appeal. Filed Nov. 11th, 1887. J. R. Wilkins, clerk, by B. P. Smith, deputy clerk. I hereby accept due services of the within notice of appeal, this 11th day of November, 1887. Chas. W. Zane, ass't U. S. att'y.

113 In the district court for the second judicial district of Utah Territory, September term, 1887.

THE PEOPLE, &C.,
vs.
ANDREW CALTON, DEF'T. } Indicted for murder.

Charge of court.

Gentlemen of the jury, you have heard the evidence in this case, and also the argument of counsel for both the people and the defendant.

It now becomes my duty to declare to you the law applicable to the case. The defendant, Andrew Calton, is accused in the indictment with the crime of murder, alleged to have been committed by him on the 14th day of July of this year, 1887, at Milford, in the county of Beaver, in this judicial district, and in this Territory, by shooting one Michael Cullen with a pistol, and by means of the shooting inflicting a mortal wound upon the of said Cullen, of which wound said Cullen did instantly die. The particulars of the charge are fully set forth in the indictment. To this charge the defendant has pleaded "not guilty." This plea puts in issue every material allegation of the indictment, and places the burden of proof upon the prosecution to make out its case in manner and form as charged.

2. The defendant is presumed to be innocent until the contrary is proved; and if you have a reasonable doubt, from the evidence, whether the defendant's guilt is satisfactorily shown, he is entitled to an acquittal.

3. A reasonable doubt is such a doubt as naturally arises in the minds of reasonable men, such as you are, who have been selected to try this case because you are reasonable men. It is not a mere possible
114 doubt, but is that state of the case which, after the comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they can not say that they feel an abiding conviction to a moral certainty of the truth of the charge. Proof beyond the possibility of a doubt is not required.

4. If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of the offense charged, but you have a reasonable

doubt in what degree he is guilty, you can convict him of the lowest degree only.

5. In the consideration of the case, you are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. These matters are left entirely with you. The court passes only upon the law.

6. Our statutes define murder to be the unlawful killing of a human being with malice aforethought.

7. Such malice may be express or implied.

It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature.

It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart.

8. There are two degrees of murder, and if you should find the defendant guilty of murder, your verdict must show whether it was murder in the first degree or murder in the second degree. If you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place alleged in the indictment, wilfully, deliberately, maliciously, premeditatedly, and unlawfully shot and killed the deceased, Michael Cullen, in manner as charged in the indictment, then your verdict should
115 be that the defendant is guilty of murder in the first degree; otherwise that he is not guilty of murder in the first degree. If you believe from the evidence, beyond a reasonable doubt, that the defendant at the time and place specified in the indictment did wilfully, unlawfully, maliciously, but without deliberation or premeditation, shoot and kill said Cullen in manner and form charged in the indictment, your verdict should be that the defendant is guilty of murder in the second degree.

The distinction between the two degrees of murder, so far as applicable to this case, is that in murder of the first degree the killing must be deliberate and premeditated, whilst in murder of the second degree the killing is not deliberate or premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice.

The word "unlawful" means without right, without excuse, in violation of law and against law.

The word "wilful" or "wilfully," when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act. The act must be intentional, and not accidental.

The word "deliberate," as applied to killing in this case, means a cool state of the blood, a state of mind contradistinguished from heat
116 or sudden passion, caused by great provocation. It does not necessarily include within its import a brooding over or reflecting upon for any considerable length of time, but it means an intent to kill, executed by the party not under the influence of a violent passion, suddenly aroused, amounting to a dethronement of reason, but in the furtherance of a former design to gratify a feeling of revenge or to accomplish some other unlawful purpose.

The word "malice" or "malicious" imports a wish to vex, annoy, or injure another person, established either by proof or presumption of law.

The word "premeditated" means thought of beforehand, for any length of time, however short. There need be no appreciable space of time between the forming of the intention to kill and the act of killing. They may be as instantaneous as the successive thoughts of the mind.

The indictment charges that which is murder in the first degree. Such indictment includes not only murder in the first and second degrees, but also manslaughter.

Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds.

First, voluntary. Upon a sudden quarrel or heat of passion.

Second, involuntary. In the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection.

You will perceive, from what I have said, that in murder the killing must be with malice. In manslaughter, malice is not present.

117 If the commission of homicide by the defendant is proven to your satisfaction, and beyond a reasonable doubt, the burden of proving circumstances of mitigation, or what justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

If you should find the defendant guilty of murder you should in your verdict state the degree, or if guilty of manslaughter you in your verdict should state the kind. If you find the defendant not guilty, your verdict should so state.

If you believe from the evidence that the defendant killed the deceased, and that the defendant at the time of killing was of sound mind and discretion, then the intent with which the killing was done is manifested by the circumstances connected with the offense, and by such sound mind and discretion. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

To convict the defendant of any crime the prosecution must not only prove every fact necessary and essential to make out the guilt of the defendant, but show that the facts proved are not only consistent with his guilt but inconsistent with his innocence.

If you believe from the evidence that the deceased assaulted the defendant in a violent manner, and in such a way that the defendant had good reason to believe, and did believe, that he was either in danger of losing his life or of receiving great bodily injury, he was justifiable in taking the life of the deceased, although in fact the defendant was in no

118 danger. But although you believe from the evidence that the deceased assaulted the defendant in a violent manner, but not in a way that defendant had good reason to believe that he was in danger of losing his life or of receiving great bodily injury, then the defendant was not justifiable in taking the life of the deceased.

Read sections 1924, 1926, 1927, 1928.

This charge and all of the instructions are to be taken and considered together.

(Indorsed:) In the 2nd district court, Utah Territory. The People, &c., vs. Andrew Calton. Charge of court. Filed Sept. 24th, 1887. J. R. Wilkins, clerk. By John Barraclough, deputy clerk.

119 Where two men engage in a dispute and scuffle without weapons and by mutual consent separate and discontinue the struggle, and then one seizes a deadly weapon and slays the other without other provocation than that engendered by the quarrel mutually discontinued, and the dispute and scuffle was not of such a character as was calculated to excite irresistible passion in the mind of a person of ordinary self-control, then the killing must be presumed to have sprung from malice; and if the killing was intentional and was deliberate and premeditated, it is murder in the first degree.

(Sufficiently covered by other instructions and charge.)

Refused.

J. S. BOREMAN, *Judge.*

If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant in Beaver County, Utah, on the 14th day of July, 1887, voluntarily shot and killed Michael Cullen, and at the time of firing the fatal shot he was not moved by an irresistible transport of passion, but was actuated by malice, and intended to kill Cullen, you should find him guilty of murder; and if you further find, beyond a reasonable doubt, that the killing was deliberate and premeditated, you should find him guilty of murder in the first degree.

(Substance being in charge.)

Refused.

J. S. BOREMAN, *Judge.*

(Indorsed:) In the district court, second judicial district, Territory of Utah. The People, &c., vs. Andrew Calton. Instructions of prosecution. Refused, &c. Filed Sept. 24th, 1887. J. R. Wilkins, clerk. By Jno. Barraclough, deputy clerk.

120 Premeditation and deliberation are the characteristic features of murder in the first degree. The meaning of the terms and the theory of the law imply that time and reflection are necessary to constitute this offense.

If a man kill another on a sudden impulse, or in the heat of passion, however unlawful, it is not murder in the first degree.

Refused.

J. S. BOREMAN, *J.*

People vs. Calton.

The determining whether the act was done with malice or maliciously, or with premeditation, or to show the capacity of the defendant to be deliberate, you can consider whether at the time defendant was intoxicated, as also in determining whether sufficient provocation has been given.

Refused.

J. S. BOREMAN, *Judge.*

People vs. Calton.

To constitute malice the act must have been done under circumstances in which ordinary men, or the average of men, recognized as peaceable citizens would not be liable to have their reason clouded or obscured by passion, and the act must be prompted by or the circumstances indicate that it sprang from a wicked, depraved, or malignant mind, a mind

which in its habitual condition is cruel, wanton, or malignant, reckless of human life, or regardless of social duty.

Refused.

J. S. BOREMAN, *Judge.*

121 People vs. Calton.

Court instructs the jury that if they believe from the evidence that the deceased assaulted the defendant in a violent manner and in such a way that defendant had good reason to believe, and did believe, that he was either in danger of losing his life or of receiving great bodily injury, he was justifiable in taking the life of the deceased, although in fact the defendant was in no danger.

Refused in form asked, but given with addition in the charge of the court.

J. S. BOREMAN, *Judge.*

People vs. Calton.

Under our statute the following persons are not capable of committing crime:

Idiots, lunatics, and insane persons.

Persons who committed the act charged without being conscious thereof.

Persons who committed the act or made the omissions charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable neglect.

Refused.

J. S. BOREMAN, *Judge.*

People vs. Calton.

The terms malice and maliciously, as defined by the statute, import a wish to vex, annoy, or to injure another person, established either by proof or presumption of law.

Given in the charge of the court.

J. S. BOREMAN, *Judge.*

Manslaughter is the unlawful killing of another without malice, as when upon a sudden quarrel two persons fight and one of them kills the other in a sudden passion upon adequate cause.

Refused.

J. S. BOREMAN, *Judge.*

(Indorsed:) In the 2nd district court of Utah Territory. The People, &c., vs. Andrew Calton. Instructions of defense refused, etc. Filed September 24, 1887. J. R. Wilkens, clerk. By Jno. Barraclough, deputy clerk.

122 If you believe from the evidence beyond a reasonable doubt that the defendant and the deceased were engaged in a dispute and scuffle without weapons, upon separating by mutual consent one seized a gun and slays the other, here, if the slayer was not impelled to inflict the mortal wound through heat of irresistible passion engendered by the quarrel, but was actuated by malice aforethought, he is guilty of murder. And if the killing was not only malicious but wilful, that is to say, intentional, and deliberate and premeditated, he is guilty of murder in the first degree.

In determining whether or not the homicide was malicious, wilful, deliberate, and premeditated the jury should take into consideration the character of the weapon used, whether deadly or not, the manner of its use, the language and conduct of the accused at the time of the killing and immediately before and after the killing, and all the circumstances and evidence in the case.

Refused as asked, but given with additions made at top.

J. S. BOREMAN, *Judge.*

It is a settled rule of law that drunkenness is no excuse for the commission of a crime, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross misconduct to shelter himself from the legal consequences of such crime. I may therefore charge you that mere voluntary intoxication will not reduce a criminal homicide below the grade of murder in the second degree.

123 But to constitute some crimes it is essential that the accused should have been actuated by a special intent or purpose; for instance, to constitute murder of the first degree it is essential that the killing be not only malicious, but wilful, deliberate, and premeditated. Now, for the purpose of determining whether a homicide was wilful, deliberate, and premeditated, it is necessary to inquire into the state of mind under which the party committed it. And in the prosecution of such inquiry his condition as to being drunk or sober is proper to be considered. A man may be drunk and yet not so drunk as to render him incapable of acting wilfully, deliberately, and premeditatedly, and when, notwithstanding his intoxication, he is capable of so acting, and does so act, he is equally responsible for his acts as though he were sober. The weight to be given drunkenness in determining the degree of crime is for the jury, and it is sufficient for the court to say to the jury that it should be received with caution, and carefully examined in connection with all the circumstances and evidence in the case.

Given.

J. S. BOREMAN,
Judge.

To reduce a homicide to the grade of manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender uncontrollable passion in any ordinary man, will suffice.

124 And again, no matter how serious the provocation, if it does not in fact occasion heat of passion on the part of the accused, if he is impelled to inflict the mortal wound by malice and not by passion resulting from provocation, or in necessary self-defense, he is guilty of murder; and if the killing was wilful, that is to say, intentional, and was deliberate and premeditated, as well as with malice aforethought, he is guilty of murder in the first degree.

Given.

J. S. BOREMAN,
Judge.

When insanity is relied upon as a defense to a criminal charge the burden is upon the defendant to establish it, unless the evidence on the part of the prosecution tends to establish it. The test of responsibility for a criminal act when unsoundness of mind is set up for a defense is the capacity of the defendant to distinguish between right and wrong at the time of, and with respect to, the act which is the subject of inquiry.

Given.

J. S. BOREMAN,
Judge.

(Indorsed:) In the 2nd judicial district court, Territory of Utah. The People, &c., vs. Andrew Calton. Instructions of prosecution. Given. Filed September 24th, 1887. J. R. Wilkens, clerk. By Jno. Barraclough, deputy clerk.

125 In every crime or public offense there must exist a union or joint operation of act and intent of criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, or affected with insanity.

Given.

J. S. BOREMAN, *Judge.*

People vs. Calton.

Good character of persons charged with crime is a fact, when proven in the case, to be considered by the jury with all the other facts and circumstances proven in the case, with the view of ascertaining whether he would be likely to commit the crime alleged against him.

Refused as asked, but given as amended by the court.

J. S. BOREMAN.

Second judicial district court.

People vs. Calton.

Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of the crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in
126 the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be used in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation and premeditation which, according as they are absent or present, determine the degree of the crime.

Given.

J. S. BOREMAN, *Judge.*

(Indorsed:) 2nd district court, Territory of Utah. The People, &c., vs. Andrew Calton. Instructions of defense. Given. Filed September 24, 1887. J. R. Wilkens, clerk. By Jno. Barraclough, deputy clerk.

127 In the district court of the second judicial district of the Territory of Utah, county of Beaver.

September 29th of the September term, A. D. 1887.
Present, Hon. Jacob S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff,
ANDREW CALTON, DEFENDANT. } Convicted of murder.

Charles W. Zane, esq., assistant United States district attorney, and said defendant, Andrew Calton, with his counsel, Presley Denny, esq., and Jno. Ward Christian, esq., come into court. The defendant is duly informed by the court of the nature of the indictment found against him for the crime of murder, committed on the 14th day of July, A. D. 1887, of his arraignment and plea of not guilty, as charged in said indictment, of his trial and the verdict of the jury, on the 24th day of September, A. D. 1887, guilty of murder in the first degree. The defendant is asked if he has any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And no sufficient cause being shown or appearing to the court, and said defendant, obn being asked by the court whether he chooses to be hanged or shot, electing to be shot, the court thereupon renders its judgment: That whereas the said Andrew Calton has been duly convicted in this court of the crime of murder in the first degree. It is therefore ordered, adjudged, and decreed that the said Andrew Calton be taken hence by the United States marshal to a place of confinement, within the Territory; that he there be safely kept in confinement until the 26th day of November, A. D. 1887; that between
128 the hours of 10 o'clock in the forenoon and four o'clock in the afternoon of that day he be taken and in this judicial district be publicly shot until he is dead.

129 In the district court of the second judicial district of the Territory of Utah, county of Beaver.

September 24th of the September term, A. D. 1887.
Present, Hon. Jacob S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff,
vs.
ANDREW CALTON, DEFENDANT. } Murder.

Come counsel for the prosecution, said defendant with his counsel, and the trial jury herein. Thereupon the hearing of the testimony herein is completed and argument of counsel is heard, and said jury, being charged by

the court, retire, in charge of officers of the court sworn therefor, to consider their verdict, and afterward return their verdict into court in the words following, to wit:

Territory of Utah. In the second judicial district court. September term, 1887.

THE PEOPLE OF THE TERRITORY OF UTAH
against
ANDREW CALTON.

We, the jury sworn and empanelled in the above-entitled case, find the defendant guilty of murder in the first degree in manner and form as charged.

D. S. MARTIN,
Foreman of Jury.

Thereupon it is ordered that Thursday next, at 10 o'clock in the forenoon of that day, be fixed as the time for pronouncing judgment herein. And it is further ordered that the jurors on the panel herein, who had been summoned specially for this case, be discharged for the term.

130 In the district court of the second judicial district of the Territory of Utah, county of Beaver.

September 23rd of the September term, A. D. 1887.
Present, Hon. J. S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff,
vs.
ANDREW CALTON, DEFENDANT. } Murder.

Come counsel for the prosecution, said defendant with his counsel, and the trial jurors heretofore accepted on the panel herein; thereupon the empanelling of the jury herein is proceded with, and of the jurors called Daniel S. Martin, James Dean, John J. Hyatt, James Atkins, and Wm. H. Gurr are found qualified and are duly sworn to try this case, and the panel of the trial jury being now complete, the testimony herein is heard in part; and said jury is placed in charge of sworn officers of the court to be so kept during the adjournment of court. And it is ordered that the jurors summoned for this case and who are not included on the panel of the trial jury herein be discharged for the term.

131 In the district court of the second judicial district of the Territory of Utah, county of Beaver.

September 22nd, of the September term, A. D. 1887.
Present: Hon. Jacob S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH, PLAINTIFF,
vs.
ANDREW CALTON, DEFENDANT. } Murder.

Come Charles W. Zane, esq., assistant U. S. district attorney, and W. H. Dickson, esq., of counsel for the prosecution, and said defendant with

his counsel, Presley Denny, esq., and John Ward Christian, esq. Thereupon a jury being called for the trial herein of the jurors called, Walter Kemp, Joseph W. Stratton, Nelson J. Vanvleet, W. J. B. Carter, William J. Jones, Joseph W. Hutchins, and John B. Prime are found qualified and sworn to try the case. And Hugh Hewson being found disqualified is discharged for the term. Thereupon, it appearing to the court that there are not sufficient number of jurors in attendance upon the court from which to complete the trial jury herein, and that the list of two hundred names of persons selected to serve as jurors for the present term being exhausted, and counsel herein consenting that fifteen additional petit jurors be summoned for this case, it is ordered that a venire be issued for fifteen persons to serve as jurors in this case, and that the same be made returnable forthwith. Thereupon the empanelling of the trial jury herein is proceeded with, but no juror called is, after examination, retained on the panel of said trial jury. And the jurors accepted on the panel are placed in charge of sworn officers of the court during the adjournment of the court.

132 *Order withdrawing venire.*

On application of Charles W. Zane, esq., assistant U. S. district attorney, it is ordered that the venire issued on the 20th inst. for 12 additional petit jurors be withdrawn in order that the U. S. marshal may complete his return thereto. And said venire is withdrawn accordingly, such return is completed, and said venire is re-filed.

In the district court of the second judicial district of the Territory of Utah, county of Beaver.

September 14th, of the September term, A. D. 1887.
Present: Hon. Jacob S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH,
vs.
ANDREW CALTON, DEFENDANT. } Murder.

Come counsel for the people and said defendant with his counsel; thereupon the plea of defendant to the charge contained in the indictment herein being demanded, he says he is not guilty thereof, with the privilege of withdrawing the same if he shall so elect, on or before Saturday next.

133 In the district court of the second judicial district of the Territory of Utah, county of Beaver.
September 10th, of the September term, A. D. 1887.
Present: Hon. J. S. Boreman, judge.

THE PEOPLE OF THE TERRITORY OF UTAH, PLAINTIFF,
vs.
ANDREW CALTON, DEFENDANT. } Murder.

Come counsel for the people and said defendant without counsel, and it appearing to the court that said defendant is unable to employ counsel, the court appoints Presley Denny, esq., and John W. Christian, esq., to act

as counsel for said defendant. Thereupon defendant is duly arraigned upon the indictment herein, charging him with the crime of murder; and the same being read to him, and his plea to the charge therein being demanded, he takes time until Wednesday next at 10 o'clock a. m. to plead thereto. Whereupon defendant is remanded to the custody of the sheriff of Beaver County, and it is ordered that a commitment issue accordingly.

134 Territory of Utah, county of Beaver, in the second judicial district court, September term, 1887.

THE PEOPLE OF THE TERRITORY OF UTAH,
against
ANDREW CALTON.

Andrew Calton is accused by the grand jury of this court by the indictment of the crime of murder, committed as follows:

The said Andrew Calton, at the county of Beaver, Utah Territory, heretofore, to wit, on the 14th day of July, 1887, with force and arms, in and upon the body and person of one Michael Cullen, in the peace of the people then and there being, unlawfully, purposely, wilfully, deliberately, and premeditatedly, and of his malice aforethought, did make an assault; and the said Andrew Calton, a certain pistol, then and there charged with gunpowder and a leaden bullet, which said pistol he, the said Andrew Calton, in his right hand then and there had and held, then and there unlawfully, purposely, feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, did discharge and shoot off at, against, and through the body and person of the said Michael Cullen; and the said Andrew Calton, with the leaden bullet aforesaid, out of the aforesaid pistol, then and there by force of the gunpowder aforesaid, by the said Andrew Calton shot off and discharged as aforesaid, then and there unlawfully, wilfully, feloniously, purposely, deliberately, premeditatedly and of his malice aforethought did strike, penetrate, and wound
135 him, the said Michael Cullen, in and upon the right side of the body of the said Michael Cullen, given to him the said Michael Cullen, then and there, with the leaden bullet aforesaid, so as aforesaid shot and discharged out of the pistol aforesaid, by the said Andrew Calton, in and upon the right side of the body of him the said Michael Cullen one mortal wound of the depth of eighteen inches, and of the breadth of one-half inch; of which said mortal wound he the said Michael Cullen then and there instantly died; and so the grand jury aforesaid on their aforesaid oaths do say, that the said Andrew Calton, the said Michael Cullen, in the manner and by the means aforesaid, feloniously, unlawfully, wilfully, purposely, premeditatedly, deliberately and of his malice aforethought, did kill and murder contrary to the form of the statute in such case made and provided and against the peace and dignity of the same.

WM. H. HARRISON,
Foreman of Grand Jury.

CHAS. W. ZANE,
Asst. U. S. Atty.

135*a* (Indorsed:) No. 428. Territory of Utah, county of Beaver, second district court. The People of Territory, etc., vs. Andrew Calton. Indictment for murder. A true bill. W. H. Harrison, foreman of grand jury. Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed by me this 9th day of September, 1887. J. R. Wilkins. Witnesses before grand jury: Jerry Tiberty, P. B. McKeon, Joseph Hague, Jesse Baldwin.

136 TERRITORY OF UTAH,
County of Beaver, ss:

I, the undersigned clerk of the second judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original judgment-roll in the foregoing-entitled action, as the same appears on file in my office, and that the same constitutes the transcript on appeal in said action.

Witness my hand and the seal of said court at Beaver City, this 28th day of December, A. D. 1887.

[SEAL.]

J. R. WILKINS, *Clerk.*
By JNO. BARRACLOUGH,
Deputy Clerk.

In the district court of the second judicial district of the Territory of Utah, county of Beaver.

THE PEOPLE OF THE TERRITORY OF UTAH,
plaintiff,
against
ANDREW CALTON, DEFENDANT.

I, the undersigned clerk of the district court of the second judicial district of Utah Territory, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action; and I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and the seal of the said district court this 29th day of September, A. D. 1887.

[SEAL.]

J. R. WILKINS, *Clerk.*
By JNO. BARRACLOUGH,
Deputy Clerk.

136*a* (Indorsed:) Filed December 30th, 1887. E. T. Sprague, clerk.

136*b* 137 (Indorsed:) No. 428. District court, second judicial district, county of Beaver. The people, &c., plaintiff, vs. Andrew Calton, defendant. Judgment-roll. Filed Sept. 29th, 1887. J. R. Wilkins, clerk, by Jno. Barraclough, deputy clerk. Filed Dec. 30th, 1887. E. T. Sprague, clerk.

138 In the supreme court, Utah Territory.

TUESDAY, *January* 17, *A. D.* 1888.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
ANDREW CALTON, APPELLANT. } From 2d dist.

This cause coming on regularly for hearing, W. H. Dickson's name was added as of respondent's counsel, and thereafter the cause argued by Presley Denny for appellant; Mr. Dickson for respondents.

WEDNESDAY, *January* 18, *A. D.* 1888.

* * * * * * *

THE PEOPLE, &C., RESPONDENTS,
vs.
ANDREW CALTON, APPELLANT. } From 2d dist.

This cause was further argued by Mr. Dickson for respondents; Mr. Denny in reply. Submitted and taken under advisement.

SATURDAY, *February* 18, *A. D.* 1888.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
ANDREW CALTON, APPELLANT. } From 2d dist.

139 This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged (Henderson, justice, dissenting) that all and singular the judgments, order denying a new trial, and sentence of the district court therein, save as to the time and publicity of the execution thereof, be, and the same are hereby, affirmed, and said cause is remanded to said district court, with directions to set and fix a day for carrying into execution the sentence and judgment so affirmed, pursuant to statute.

Thereupon counsel of appellant asked the allowance of a writ of error removing this cause to the United States Supreme Court, and that execution be stayed till such writ be disposed of; and the court having duly considered thereof, orders that said writ be allowed and execution stayed, as so asked.

140 In the supreme court of Utah Territory, January term, 1888.

THE PEOPLE OF THE TERRITORY OF UTAH, respondents,
vs.
ANDREW CALTON, APPELLANT. }

Zane, C. J.

At the September term of the district court of the second judicial district, the appellant was found guilty by a jury of the crime of murder in

the first degree. A motion for a new trial having been submitted and overruled, and the defendant, as was his legal right, having elected shooting as the mode of punishment, the court sentenced him to be shot on the 26th day of November, 1887; from that judgment he has appealed to this court.

The first ground of reversal relied upon by defendant in the order we will consider, the errors assigned, is that the evidence was insufficient to authorize the verdict.

It appears from the evidence given on the trial that the deceased, Michael Cullen, and the appellant, Andrew Calton, and one Jerry Tiberty were acquaintances, and were residents of the Star Mining District, in the Territory of Utah; that about 10 o'clock of the morning of July 14th, 1887, these men met a few miles away in the town of Milford, the two last named having gone there together. Tiberty testified to this effect. When they alighted Michael Cullen came up and they went into a saloon and drank with him; that during the day they drank together five or six times; once or twice they drank beer;
141 the other times whiskey. It appears that they started home about six o'clock in the evening of the same day, Calton and Cullen sitting on the wagon-seat, and Tiberty lying on some ore-sacks behind them; that Calton was driving and Cullen sitting to his left. Tiberty testified further: Soon after they had started they all took a drink out of a bottle, and after they had crossed the railroad Calton's whip-lash dropped off and he (witness) left the bottle on the sacks and jumped out to get the lash. While he was tying it on Cullen asked for a drink, and witness told him he could get it if he would turn around. Cullen did so, but witness did not see whether they drank or not; he himself was busy with the whip, and when he looked up he said, "You are fine fellows, to drink without offering me any." Calton answered, "Mike has it," and said to Cullen, "Give Jerry a drink, it is his whiskey." Cullen had the bottle under his arm and Calton reached over and took hold of the neck of it and held on, and in the struggle that ensued some of the whiskey was spilled, and witness seeing that Cullen was not willing to give it up said, "Damn the whiskey, I do not want it," and then said, "Drive on," walking ahead a few steps, thinking they would follow. Calton got the bottle and held it up, saying, "Come back, here it is, I have it." Witness then went back and got it and put it in his side pocket, and again said, "Drive on, I will walk. You may not get any more on the way." After taking a few steps he looked around and Calton raised straight up in the wagon, and the two men had their hands on each others necks. He then ran back and put his foot on the hub of the front near wheel to get up and separate them, and got in behind the seat. Calton was then leaning over the dash-board. Cullen was in his seat, and did not rise from it, so far as witness saw.
142 Witness then said, "What are you quarreling about; two friends quarreling for nothing. You ought to be ashamed of yourselves." Witness then tried to coax them to let go, and finally said to them that he would put them out if they did not. He tried for a couple of minutes to separate them. Cullen had his hand up and said, "You will choke, will you, you s—n of a b—h," and going to strike Calton. Witness ran his arm between them and "saved him from the balance." Calton then said: "Let's quit," and they both let go. Cullen was then in

the seat and had not gotten out of it. Calton then picked up a bundle and jumped out of the wagon, alighting upon his feet. The team started and witness jumped from the wheel, and after a little time with difficulty got hold of the bridle of the near horse (his hands being crippled), he then heard Calton say, "You will abuse me," or "You will choke, you s—n of a b—h," and turning round he saw Calton take his pistol out of the bundle he carried. Calton said, after he got out, "I don't give a damn if you are Mat Cullen's brother, you cannot abuse me." Cullen was sitting in the seat, and it was not half a second after he saw the pistol until the first shot was fired. Calton kept on firing. Witness hallooed, "I say, for Christ's sake quit that." Calton answered, "Oh, he is dead. The first shot killed him, and I might as well give him the rest." Witness said, "No, he is not dead," and he kept on firing and witness kept on saying, "Quit that, he is not dead." Afterwards, when they were coming down to Milford, witness said, "The second or third shot missed fire." Calton then said it was the second. After the shooting witness said, "Well, we must go back to Milford." Calton answered,
143 "Yes." The witness had dropped his hat when he caught the horses and Calton picked it up. And witness picked up Calton's and handed it to him. Witness said to Calton just as they turned around, that he wished he had let the horses go and had tried to grab him, and Calton answered that it was no use, he would have got him anyway. Calton drove back to Milford, the body remaining on the seat by Calton, witness holding it there. As they were going back witness said he was sorry, and Calton replied that he was sorry, too; that he did not pack that gun for Cullen, and he wished it had been Dan Mackintosh. Just outside the town he asked where they should drive, and witness told him. After they reached Milford Calton said, on two or three occasions, when men shook hands with him, that he did not think they would shake hands with a murderer, and said to the witness, "My life is not worth one cent to me now." Witness McKeon testified, he saw the three men going out. Tiberty appeared to be sober. When they came back Calton said he shot him, and shot him after he was dead. Calton told witness that the pistol was in the scabbard, and witness got it. Its caliber was 44 or 45.

Dr. Fowler made a post-mortem examination, and testified that there were nine bullet wounds on the person of the deceased. Four were probably made by one bullet, and three might have been made with another. They were fatal.

Witness Baldwin testified that Calton said he shot Cullen because he was choking him; that he shot him in self-defense. Calton also said to Dr. Hagan, "Here is your partner; I killed him, and I killed him good." Calton and Tiberty acted as if they were drunk. Calton had some scars on his face and neck.

144 Witness Moore testified that Calton said he killed him the first shot, and thought he would put the balance of the shots in him, and was forced to kill him; that he thought Calton was then intoxicated.

A. M. Stoddard testified that Calton said he had been insulted and bought a pistol with the intention of killing the next man who insulted him, and witness said, "I suppose you have done it now," and Calton replied, "Yes."

A. J. Lewis testified that he had known Calton four years; that he had the reputation of being a very quiet man, sometimes not speaking to anyone for two or three days; that witness thought that he was crazy, and that Calton received ordinary wages as a miner. O. S. Carver testified that he had known defendant eight or nine years, and that he was always considered a peaceable and quiet citizen. Mr. Burnison also said that defendant had the reputation of being a peaceable and quiet man. There was evidence that Calton had armed himself with a pistol on another occasion, and had made threats of violence, but there was no evidence to show that there had ever been any unfriendly feeling between him and the deceased before the fatal occasion. On the contrary there was evidence to show that they had been on friendly terms.

Owing to the nature of the case and the alleged condition of the three men, and the alleged want of capacity of the appellant, we thought it necessary to state the evidence thus fully. This evidence proves to a moral certainty that the appellant caused the death of the deceased by a pistol shot, and that the killing was not excusable or justifiable. The further question remains, did the appellant inflict the fatal wound with such
145 a deliberate and premeditated intention to take the life of Cullen as authorized the jury to find him guilty of murder in the first degree? It appears from the evidence that while the appellant and the deceased were engaged in an angry altercation in the wagon, attended with personal violence, when remonstrated with by the witness, Tiberty, the appellant said, "Let's quit," and that the struggle then ceased. That thereupon the appellant got the bundle in which the pistol was, and jumped out of the wagon upon the ground, and saying, "You will abuse me or you will choke me, you s——n of a b——h," took the pistol out of his bundle, and cursing the deceased. "I don't give a damn if you are Mat Cullen's brother; you can't abuse me," he said, and fired the deadly shot while Cullen was sitting upon the seat. And when Tiberty hallooed to him to quit, he said, "Oh, he is dead; the first shot killed him, and I might as well give him the rest." And when told that Cullen was not dead, kept on firing in spite of the remonstrance of Tiberty, and afterwards, when told that the second or third shot missed, replied that it was the second.

The reasonable inference from the language and conduct of the appellant is that he formed the design of taking Cullen's life before he jumped out of the wagon, and he then commenced preparing to execute his purpose, by getting the bundle in which the pistol was, by getting into a position by jumping out of the wagon, by getting his weapon, in taking it out of the bundle and out of the scabbard, by leveling the pistol at the vitals of the deceased, and by firing the deadly shot. Such preparation indicates unmistakedly thought and design; it shows premeditation—a definite intent to take the life of Cullen.

146 The means he used, the acts he performed, were suited to the result, the death of the deceased. He understood the means that he used and anticipated the effect. Sec. 1917, Comp. Laws of Utah, 1876, gives in substance the common law definition of murder, viz: "Murder is the unlawful killing of a human being with malice aforethought, and Sec. 1918 defines malice essential to murder. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature; it is implied when

no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." Sec. 1919 makes the distinction between murder in the first and in the second degree: "Every murder perpetrated by poisoning, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree."

Sec. 1921 defines manslaughter: "Manslaughter is the unlawful
147 killing of a human being without malice. It is of two kinds: First, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act not amounting to felony or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

While the killing shown by the evidence in this case was immediately after an angry quarrel and a violent altercation attended with heat of passion, it can not be said that it was not in pursuance of a specific and distinctly formed intention to take the life of the deceased. There being an intention to kill, and no provocation to justify or excuse it, the killing must have been malicious, unless the passion was so great that the intent resulted from it, and the intention was without thought, and the act of killing proce'ded from the passion alone, or so nearly alone that the passion could be said to be the controlling source or author.

The unlawful killing of a human being with malice aforethought was murder at common law. Sec. 1919, above quoted, describes two classes of murder, and distinguishes one as murder in the first degree and the other as murder in the second degree. And, again, it distinguishes certain kinds of homicides us murder in the first degree by the act, the intent, the object, and the circumstances, or by one or more of these. It descirbes one kind of murder in the first degree by the measure alone—the amount of the deliberation which precedes it. The intent essential to murder is the state of mind—the intention at the time of the act that causes death. The law does not require deliberation after the intent and before the act of killing. It does require that the men shall be able and have an
opportunity to think about the killing; that he may deliberate
148 and meditate upon it; and whenever the deliberation is sufficient to form therefrom a specific and well-defined intention to kzll the person afterwards slain, it is enough to characterize the killing as murder in the first degree. On the contrary, if the action of the mind is so impeded and hindered by passion, intoxication, or other sufficient cause, that it can not during the time intervening sufficiently think and deliberate upon the act and its consequences as to be able to form a distinct and perfect intention in the light of thought and reason, the premeditation is not sufficient to characterize the crime as murder in the first degree. No man who had not the capacity or was not free to think and reason about the

act, and who had not adequate opportunity to form a distinct and definite intention in the light thereof, ought to be deprived of his life for an act flowing from such an intention. As a general rule the law disregards acts and their consequences that do not follow intentions. Therefore an individual is not bound by an act as to which he had no opportunity or capacity to form an intention. And with respect to the crime of murder, the want of deliberation and premeditation palliates the crime to murder in the second d'gree, though the killing was intentional and malici'us. When the act of killing does not proceed from a malicious intention but does proceed from passion, or is the result of negligence, the crime is reduced to manslaughter. The law abates and yields so much on account of human infirmities.

We are of the opinion that the evidence authorized the jury to find that the appellant with the capacity and opportunity to reason and with
149 premeditation formed a specific and distinct intention to take the life of Cullen, and therefore to find him guilty of murder in the first degree.

The proposition of law that homicide is murder in the first degree when the person killing had the opportunity and the capacity to deliberate upon the act and to form a specific and distinct intention from such deliberation is supported by the following authority: 2 Bishop on Crim. Law, Sec. 728; Keanan vs. Commonwealth, Penn. State, 55; Wharton on Crim. Law, vol. 2., Sec. 1084–1106; State vs. Bealobe, 17 Cal., 389; State vs. Williams, 43 Cal., 344.

The appellant excepts to the following portion of the charge of the court to the jury, and assigns the giving thereof as error: "To reduce homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion the provocation must have been considerable; in other words such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation such as is not calculated to engender uncontrollable passion in any ordinary man will suffice.

Counsel for the appellant contend that such provocation as would be calculated to cause irresistible passion in an ordinary, a reasonable man, is not necessary to reduce homicide that would be murder to manslaughter. The law, in selecting a human standard by which to measure human conduct, selects an ordinary not an extraordinary man, a reasonable not an unreasonable man, for the law is based upon reason; it selects reasonable standards. It selects such a provocation as the reason of such a man
150 would not be likely to control. In other words not such a provocation as would be calculated to awaken a passion that the reason of an ordinary man would be likely to resist. Assuming (as we must in the absence of proof of insanity or imbecility) that the appellant was a man of ordinary capacity, he should have controlled such passion as a reasonable man could restrain, and would be likely to restrain.

It is very difficult in many cases to distinguish manslaughter from murder. The act that caused death may have been wilful, but death may not have been intended. The intention to kill may have been formed and life taken during or soon after an angry quarrel or amid or immediately after violence and excitement. In order to determine whether the accused in any given case acted from reason or passion the provocation, the weapon

used, if any, the preparation for the act, his expressions, and all the circumstances must be considered, and although it appears that the act proceeded to some extent from malice upon reflection and calculation and to some extent from passion that will be held to be the cause which had the preponderating influence. Passion to some extent almost always influences the slayer when the fatal wound is given during or soon after a quarrel or a fight, and conversely malice to some extent influences the party killing in either case, but the law charges the act to malice or passion, as the one or the other is found to be the preponderating cause for the act. In ascertaining this fact as all others in criminal cases, the jury must give the accused the benefit of any reasonable doubt. "The passion must be such as is sometimes called irresistible, yet it is too strong to say that the
151 reason of the party should be dethroned or he should act in a whirlwind of passion. There must be sudden passion upon reasonable provocation to negative the idea of malice, and the passion must proceed from what the law accepts as an adequate cause, else it will not reduce the felonious killing to manslaughter. Bishop Crim. Laws, vol. 2, sec. 697. We find no error in giving the portion of the charge above quoted.

The defendant also alleges as error the statement to the jury of the following principle of law: "When insanity is relied upon as a defense to a criminal charge, the burden is upon the defense to establish it, unless the evidence upon the part of the prosecution tends to establish it. The test of responsibility for a criminal act, when unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry." The law presumes that the mind is in its normal condition until some evidence of unsoundness or imbecility appears.

We understand that the capacity of a person accused of crime to determine whether the criminal act was right or wrong is the correct test of responsibility. If a man with ability to refuse kills another with the knowledge that it is wrong, he is responsible to the law for the act. We are of the opinion that this exception is not well taken.

The court in substance stated to the jury that the law will not permit a person who commits a crime while intoxicated to avail himself of his own "gross vice and misconduct" as a justification therefor. Appellant excepted to the use of the terms "his own gross vice and miscon-
152 duct," and assigns the same as error. This was a statement of the law with respect to a hypothetical case. In it the court did not say, as counsel urged that he did, that the appellant had such a gross vice or that he had been guilty of such misconduct. The court characterized drunkenness as a gross vice and as misconduct. The court informed the jury that drunkenness, if proven, might be taken into consideration in determining whether the homicide was wilful and premeditated and that the weight to be given such fact if found was for the jury, and that they should receive evidence thereof with caution and carefully consider it in connection with all the evidence in the case. The jury were told to carefully consider the evidence of drunkenness with all the other evidence. In this we find no error.

The court permitted W. H. Dickson, private counsel, to aid the assistant district attorney in the prosecution of the defendant. This action

of the court the defendant assigns as error. Counsel for appellant refer to subdivisions 2, 5, and 6 of section 257, Criminal Code of Laws of Utah, 1878: "The prosecuting attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude the argument."

As we construe the foregoing provisions they do not deprive the court of the discretion to permit private counsel to aid the prosecutor. The prosecuting attorney or other counsel for the people are mentioned in the provisions quoted, except in connection with the closing sentence and
153 it is there stated that the prosecuting attorney may conclude the argument. It would be unreasonable to assume that the legislature in the use of this language in the connection in which it appears intended to deprive the court of the discretion to permit counsel other than the public prosecutor to close the argument. The court should so control the argument as to prevent any thing improper, any unfairness or injustice to the accused. This point was expressly decided in the case of People vs. Tidwell, Pac. Rep., Vol. 12, No. 2, p. 61.

The appellant also asks for a reversal for the reason as alleged that he did not have sufficient time to prepare for trial. The homicide occurred on the 14th day of July, 1887. The indictment was found on the 9th day of the following September; the appellant was arraigned and counsel appointed to defend him on the day following; on the 14th day of the same month he pleaded not guilty; a jury was empanelled on the 21st, and on the 24th of the same month returned a verdict of guilty. It does not appear that the defendant asked for further time to prepare for trial, or that other material evidence could have been produced if the trial had been postponed.

The reason urged constitutes no sufficient ground for a reversal.

In the argument counsel suggested that the record shows that the defendant was sentenced to be executed publicly. The use of the word public in connection with the execution being a clerical error the court below possesses the undoubted authority to correct the judgment in that
154 respect. We do not regard it as a ground for a reversal.

We find no error in this record sufficient to authorize a reversal. The judgment of the court below is affirmed. Boreman, Justice, concurs.

(Indorsed:) The people of the Territory of Utah vs. Andrew Calton. Filed Feb'y 18th, 1888. E. T. Sprague, clerk.

155 Utah Territory supreme court.

THE PEOPLE, ETC.,
vs.
ANDREW CALTON.

Henderson, J., dissenting.

I do not concur in affirming the conviction in this case.

The defendant was convicted of murder in the first degree, without recommendation to mercy, and sentenced to death.

The record shows that the prisoner was represented in his defense by counsel appointed by the court. After conviction, a statement was made on motion for a new trial, embodying a full transcript of the proceedings on the trial, from which it appears that Charles W. Zane, assistant district attorney, and William H. Dickson, counsel, appeared for the people. The record shows that Mr. Dickson examined and cross-examined all the witnesses; indeed, that he conducted the entire case for the people, except that Mr. Zane, at the conclusion of the evidence, opened the argument to the jury for the prosecution, and that Mr. Dickson closed the argu-
156 ment. All this is shown in the record in detail, and nothing whatever is shown or stated as to how or in what manner Mr. Dickson became connected with the case, or that there was any reason shown for his appearance, or for allowing him to close the argument instead of the assistant district attorney, or that the attention of the court was called to it in any manner, or that any objection was made to it. Indeed, there is nothing said about it, except a detailed statement of the facts. The statute provides (sub. 5, sec. 257, page 115, criminal procedure act of 1878) as follows:

"When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude the argument."

By the next section it is provided, "When the state of the pleadings requires it, or in any other case for good reasons and in the sound discretion of the court, the order of argument prescribed in the last section may be departed from."

157 By what is known as the Poland Act, the district attorney has charge and control of all prosecutions under the laws of the Territory. So it stands just as though the district attorney was named in the statute above quoted instead of the prosecuting attorney. It will be seen that the record shows that in this case there was done just what the statute says shall not be done except for good reasons shown and in the sound discretion of the court. The people were represented by an assistant district attorney of ability and experience, and the other counsel that appeared for the people was not the district attorney and is not an assistant. Of all this, this court has judicial knowledge, as the laws of Congress (Sec. 2 of the Poland Act of 1874, Comp. Laws 52) provides that the district attorney or his assistants shall perform the duties of prosecuting officers under the laws of the Territory, and also provides that the appointments and oaths of office of such assistents shall be filed in this court. It is argued
158 in support of the conviction that this question is not available to the prisoner, because the record is silent upon the subject, and therefore the presumption is that good cause was shown. I do not concur in this view. After this conviction and sentence this record was made up, and, as before stated, states the facts in detail, the stenographer's notes, fully transcribed, being a part of the record. The statute says that the prosecuting attorney or other counsel for the people must open the argument, and the prosecuting attorney may conclude the argument. The statute has carefully and definitely prescribed the order of the argument, and provided that when other counsel than the prosecuting attorney appear for the people they may open the argument but shall not close it, unless upon

cause shown the court in its sound discretion permits it. In order to change this order of argument, some cause must be shown. The sound discretion of the court is required to be exercised. The assistant district attorney was there, and if a showing was made and the judgment of the court was
159 taken upon it, I think the record should show it, and that if it does not, in a capital case we ought not to indulge in any presumption that it was done. We are referred to the case of The People vs. Strong, 46 Cal., 302. In that case the court held under a statute like ours that it is improper to allow other counsel than the prosecuting attorney to close the argument, without good cause shown; but they say that it is to be presumed that it was shown unless the contrary appears. That was a case of larceny. The report of the case upon this branch is very meagre. As to whether counsel for the defendant appeared for him by order of the court or in the ordinary way, on his own employment, is not stated. It does appear, however, that counsel for the prisoner objected to the closing of the argument by other counsel than the prosecuting attorney, and that the court overruled him. It therefore does affirmatively appear that the judgment of the court was called into action upon the subject, and the court only
160 decided that they would not undertake to say that there was no evidence or showing to support the ruling of the court when the record is silent upon that subject, but does show the ruling. In the case at bar there is nothing to show that the court was called upon in any way to exercise its judgment. It is urged that as no objection was made in the court below, the prisoner can not now have the benefit of it. The prisoner was not represented by counsel employed by himself. The court appointed counsel to conduct the defence, and through one of its officers undertook to conduct his defence for him. It is true that the counsel who appeared in this case is of unimpeachable integrity and great ability, but this does not in my judgment alter the case. Indeed to have such counsel close the argument when employed by private parties would be more dangerous to the defendant than counsel of less ability. I think where the charge is murder in the first degree, and the people are represented by the
161 assistant district attorney on the trial and the prisoner is defended by counsel appointed by the court, and after conviction and sentence to death a statement is made on motion for new trial, embodying a detailed statement of the evidence and proceedings on the trial, and it appears from such statement that other counsel than the district attorney appeared, conducted the prosecution, and closed the argument to the jury, the record ought to show why the statutory rule was departed from, and if no reason for it appears, that this court ought not to indulge in any presumptions against the prisoner in relation to it.

Again, the statute (sec. 1920, Comp. Laws, 1876, page 586) provides: "Every person guilty of murder in the first degree shall suffer death, or, upon recommendation of the jury, may be imprisoned at hard labor in the penetentiary for life, at the discretion of the court." * * It will be seen by this statute that in a measure the jury fix the punishment in cases of murder in the first degree. Without this recommendation the
162 court has no discretion in the matter whatever, but to fix the day of execution. In this case the attention of the jury was not called to this statute, nor were they instructed in relation to it. The charge is given in full and incidental remarks of the court during the trial, but nowhere is

this statute called to the attention of the jury. Several sections of the statute were read to the jury in the charge of the court, and some that are found on the same page with this one. I think the attention of the jury ought to have been called to this statute and they instructed in relation to it, and that for this reason the conviction ought to be set aside and a new trial ordered. The prisoner was deprived of a substantial right. The determination of the question as to whether he should suffer death or imprisonment was one of vital consequence to him. The jury, to whom the statute commits the *the* determination of that question, at least in part,
163 were not informed of their duty and responsibility in the matter so as to require them to exercise their judgment and discretion in relation to it, and by the verdict they rendered the court had none.

This record, at least to my mind, shows that the verdict and judgment is a harsh one. The homicide occurred when all the parties were more or less intoxicated. It was in a difficulty then immediately springing up between them over a most trivial matter, and proceeding at once to blows, and from blows to the homicide, the deceased and the prisoner being friends up to that time. From the time when the difficulty first arose to the time of the homicide could not have been more than ten minutes, and perhaps not more than half that time. If speculations and presumptions are to be indulged in, the one most reasonable to my mind is, that the sequel to the harsh verdict and judgment in this case is found in the matters before stated.

164 I think the judgment should be reversed, and a new trial ordered.

Filed February 18, 1888.

E. T. SPRAGUE, *Clerk.*

165 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgement, order, and decree in a suit which is in the said supreme court of the Territory of Utah, before you, in which The People of the Territory of Utah were plaintiffs and respondents, and Andrew Calton was defendant and appellant, manifest error hath happened to the great damage of the said Andrew Calton—

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf—do command you if judgement be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington,
166 on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error that of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, and the seal of the supreme court of the Territory of Utah, the 18th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] E. T. SPRAGUE, *Clerk.*

Allowed by the supreme court of Utah Territory.

C. S. ZANE,
Chief Justice Utah Territory.

A citation and the service thereof in the cause in the foregoing writ described is hereby waived.

GEO. S. PETERS,
U. S. Att'y.

(Indorsed:) In the Supreme Court of the United States. Andrew Calton, pl'ff in error, vs. The People of the Territory of Utah. Writ of error. Filed Feb'y 18, 1888. E. T. Sprague, clerk.

167 THURSDAY, *March 1st, A. D.* 1888.

* * * * * * *

THE PEOPLE, ETC., RESPONDENTS,
vs.
ANDREW CALTON, APPELLANT. } From 2d dist.

A petition for the rehearing of this cause was brought to the attention of the court and taken under advisement.

FRIDAY, *March 2d, A. D.* 1888.

* * * * * * *

THE PEOPLE OF THE TERRITORY OF UTAH,
respondents,
vs.
ANDREW CALTON, APPELLANT. } From 2d dist.

The petition for the rehearing of this cause, heretofore submitted, is hereby overruled and denied, the court being of opinion that it has no jurisdiction in the premises.

168 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

ANDREW CALTON, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH,
defendants in error.

TERRITORY OF UTAH,
County of Salt Lake:

Presley Denny, being duly sworn, says that he was appointed by the district court of the 2d judicial district Utah Territory as counsel to defend the above-named Andrew Calton; that the said Andrew Calton is

a pauper and wholly unable to employ counsel, or to pay the costs of the trial herein, or of his defence; that affiant has not the promise or hope of reward for any services he may render in defending said Calton, and that he has paid his own expenses so far in the defense of said plaintiff in error.

PRESLEY DENNY.

Subscribed and sworn to before me this 13th day of February, 1888.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsed:) United States of America. Andrew Calton, plff. in error, *vs.* The Territory of Utah. Affidavit of pauperism. Filed Feb'y 18, 1888. E. T. Sprague, clerk.

169 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

ANDREW CALTON, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH,
defendants in error.

Now comes the said Andrew Calton, by his attorney, and says there is manifest error in the record and proceedings and judgment of the supreme court of the Territory of Utah, and assigns the following as error, to wit:

1st. The supreme court erred in affirming the judgment of the district court, wherein and whereby it was adjudged that the said plaintiff in error should be shot to death, also in affirming the judgment and order of the district court overruling the motion of the plaintiff in error for a new trial, for the following reasons as assignments of error:

The court erred in allowing W. H. Dickson to appear and prosecute for the people as private prosecutor, the assistant U. S. attorney being present to prosecute; plaintiff in error not being able to employ counsel.

170 2d. The court erred in allowing W. H. Dickson, private counsel, to close the argument for the people in said case.

2d. The court erred in giving the instruction No. 24, on page 112, on transcript.

3d. The court erred in giving instruction No. 26, on page 113 and 114 of transcript, page of this record.

4th. The court erred in giving instruction No. 27, on pp. 113 and 114 of transcript of reporter, and pages of this transcript.

5th. The court erred in giving instruction No. 27, on page No. 27, on page 114 of transcript of reporter and of this record.

6th. The court erred in giving instruction No. 28, on page 115 of of transcript of reporter of this record.

The court erred in giving instructions on its own motion.

The court erred in giving the instructions asked by the prosecutions.

The court erred in refusing to give the instructions asked by defendant, marked refused, No. 1, 2, 3, 4, 5, and 6.

171 The court erred in giving all of the instructions not asked by the defense.

The evidence is insufficient in this, that it did not show that there was any deliberation or premeditation in the killing of said Cullen.

2. That the same was done, if at all, in the heat of passion, and not in cold blood.

3. That there was no time for reflection or deliberation.

4. That defendant was not of sound mind and discretion.

5. That the evidence showed that at the time of the shooting defendant and deceased were both drunk; that they had a quarrel; that the defendant had good reason to believe that deceased could and would do him great bodily injury if he did not prevent it; that defendant was of unsound mind, and under the circumstances was not capable of reflecting or deliberating as to his acts.

6. That the evidence fails to show that there was any malice on the part of the defendant.

172 The plaintiff in error therefore prays that said judgment and decision of the supreme court of the Territory of Utah, affirming said judgment and said order, may be reversed, and that a mandate may issue from this honorable court directing the said supreme court of said Territory to reverse the judgment and order of the district court and remand the case to the said district court with an order to said district court to grant said plaintiff in error a new trial.

(Indorsed:) Supreme Court of the United States. Andrew Calton, plaintiff in error, vs. The People of the Territory of Utah. Assignment of errors. Filed Feb'y 18, 1888. E. T. Sprague, clerk.

173 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, E. T. Sprague, clerk of the supreme court of Territory of Utah, in pursuance of the writ of error hereto attached, do return annexed hereto a transcript of this record and proceedings and opinion of said court, dissenting opinion of Henderson, justice; affidavit of pauperism; assignment of errors, all in and of the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion and dissenting opinion, affidavit, and assignment of errors is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said supreme court of Utah Territory this 28th day of September, A. D. 1888, at Salt Lake City.

[SEAL.] E. T. SPRAGUE,
Clerk.

(Indorsement on cover:) No. 1408. Andrew Calton, plaintiff in error, vs. The People of the Territory of Utah. Utah Territory supreme court. Filed October 20, 1888. Supreme Court U. S. Received Oct. 4, 1888. Clerk's office.

Office Supreme Court U. S.
FILED.
OCT 24 1888
JAMES H. McKENNEY.
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE TERRITORY OF UTAH,
Respondents,
vs.
ANDREW CALTON,
Appellant.

Appellant's Brief on Error from Supreme Court of Utah.

ARTHUR BROWN,
Counsel for Defendant.

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE TERRITORY OF UTAH, *Respondents,*

vs.

ANDREW CALTON, *Appellant.*

Appellant's Brief on Error from Supreme Court of Utah.

Appellant was convicted of murder in the first degree at the September term of the Second District Court for Utah, 1887; an appeal was taken to the Supreme Court, and judgment affirmed, Justice Henderson dissenting. A writ of error was thereupon sued out from this court.

Defendant did not have a fair and impartial trial, and justice was not done him. This will appear from the record of the trial.

He did not have sufficient time to prepare for trial, nor his counsel appointed by the court, to ascertain whether he had any defense or not.

The indictment was found September 9th, 1887. He was arraigned, and counsel appointed on the 10th. On the 14th he pleaded not guilty. A jury was impaneled on the 21st, and on the 24th of September, 1887, the verdict was rendered. No time was given his counsel to ascertain whether he had a

defense or not. The defendant was a foreigner confined in jail; was a pauper, without friends or any means to employ counsel or prepare for his defense, and his counsel had no opportunity of inquiring. The case was set for trial, hurried through simply to suit the convenience and wishes of the private prosecutor and his counsel. It may be true that further time was not asked, because in the short time allowed it was not ascertained that it was necessary.

The court erred in allowing W. H. Dickson to appear as private prosecutor. Whatever might be the right or discretion of the court, in other cases, where the defendant has means and able to employ counsel, it is improper and unnecessary where the defendant is a pauper and unable to employ any counsel, and the regular prosecuting attorney for the Territory is both ready and able to prosecute.

The court will take notice of its officers, and that the prosecuting attorney, in charge of this district, and who was present and appeared in the trial of said case, has prosecuted other cases for murder, and was competent to so prosecute when no assistant counsel was necessary.

The employment of *private* counsel to prosecute a man unable to employ any counsel to defend himself, when the people are amply able and have competent attorneys, is turning the prosecution from a public to a private one, in the interest of individuals, and for their gratification. While the Supreme Court of the Territory have recognized the right in certain cases, yet it has only been where the defendant was able to meet it by attorneys or counsel of his own employment.

The court allowed W. H. Dickson, private counsel, to close the argument to the jury. This was error.

The statutes of Utah provide that the district attorney must close the argument, if any argument is made. Sub. div. 5, Sec. 257, p. 115, laws of 1878, Crim. Procedure: "The pro-

secuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude the argument." That is, if any argument is made after defendant's, the *prosecuting attorney must make it.*

The California statute is different; it provides that *other counsel* may conclude the argument. The Utah statute being taken from the California, and the provision as to *other counsel* being omitted, shows the intention to preclude any but the prosecuting attorney from closing.

It may be said that no objection was made to private counsel either appearing or closing.

The answer is, it was not necessary. The defendant had no attorneys, those who appeared for him were simply *counsel* appointed by the court. He was not their client, nor were they his selected attorneys. They acted only as appointees of the court, because they were officers of the court. An attorney is one retained by the client and of his selection. A counselor is one who simply advises. The statute mentions both, but when a criminal is arraigned without either, it speaks of counsel only being appointed. If the distinction between attorney and counselor still prevails, they were not required to conduct the trial (which would be under the entire control of the court) but only to advise.

They were simply advisers of the court, (30 Cal., 539) and could not have refused to act had they desired.

17th Cal., 62.

Acting then only as officers of the court, as advisers of the court, it was the duty of the court to refuse to allow any person not authorized by law, to take part in the prosecution, whether objection was made by defendant or not.

An act in relation to courts and judicial officers in the Territory of Utah, approved June 23rd, 1874, Comp. Laws Utah, p. 52, provides, Sec. 2:

"That it shall be the duty of the United States attorney

in said Territory in person or by assistant, to attend all the courts of record, having jurisdiction of offenses as well under the laws of said Territory, as of the United States, and perform *the duties of prosecuting officer in all criminal cases arising in said courts.* The appointment and oath of each assistant to be filed with the Clerk of the Supreme Court of the Territory."

We call the attention of the Court to the fact that in the Supreme Court of Utah neither the United States attorney for Utah, George S. Peters, nor any assistant, either appeared in, filed a brief, or made any argument in said case, and the record of the hearing in said case shows that one W. H. Dickson, *only*, appeared therein for the people, and without any authority. Showing that the prosecution of defendant was conducted by private counsel, employed by private parties from beginning to end.

INSTRUCTIONS OF THE COURT.

The court erred in giving instruction No. 26, pp. 113, 114 of Transcript, with comments as to intoxication, as follows:

"The law will not allow him to avail himself of his own gross vice and misconduct."

The court had no right to characterize the condition or conduct of the defendant as being a gross vice or otherwise. It tended to hold him up to reproach and disgrace before the jury.

The statute authorizes intoxication to be given in evidence where defendant is charged with murder. It was as legitimate as any other evidence in the case, and the court had no right to lecture the jury as to its being moral or immoral, vice or misconduct, any more than any other evidence.

Also the latter part of the same instruction "that it should be received with caution, and carefully examined."

The laws of the Territory of Utah, page 115, Sub. 7, laws 1878, and as amended laws 1884, provide that the judge shall not charge the jury as to matters of fact, or the weight of the evidence. This instruction was both.

People v. Hopt, 110 U. S., 594.
8th Cal., 216.
People v. Williams, 17 Cal., 142.
People v. Dick, 32 Cal., 216.

MANSLAUGHTER.

Instruction No. 27 was erroneous. It does not correctly state the law of manslaughter, but by reason of its erroneous and extreme statement as to what constitutes manslaughter, it took the consideration of that question from the jury. It says: "The provocation must be such as to cause *irresistible passion* in the mind of a reasonable person. It must be such as to engender *uncontrollable passion*."

If the passion were *irresistible* and *uncontrollable*, the killing would be the direct result of the passion. He would for the time be devoid of all reason, and insane, and guilty of no offense.

The statutes of Utah, Compiled Laws, p. 586, Sec. 1921, define manslaughter as follows:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds. First. Voluntary; upon a sudden quarrel or heat of passion. Second. Involuntary; in the commission of an unlawful act, * * * or in an unlawful manner, or without due caution or circumspection."

It is for the jury to determine the amount of passion—whether great or small—not the court.

The jury might well say—in considering whether it was manslaughter, under the instruction—that although without

malice, done in a sudden quarrel, and in the heat of passion, as defined by statute, yet, not being irresistible and uncontrollable, it was not manslaughter; therefore it must be wilful and deliberate murder.

"It is not necessary that the *passion be such as to shut out knowledge, destroy volition or dethrone reason.* The law does not look upon him as temporarily deprived of intellect, * * * but as one in whom the exercise of judgment is impeded by the violence of excitement."

State v. Hill, 4 Dev. and Batt., N. C., 491–496.
Horrigan & Thompson cases on self-defense, 206.
2 Bishop Cr. L., Secs. 676, 697, 698, 699.
Roberts v. State, 14 Misso., 138–409.
Hail v. State, 1 Swan Tenn., 248.

In Ray v. State, 15 Ga., 244, the court says: "According to law, the *provocation* which reduces homicide to voluntary manslaughter, must be one which involves *some assault*, though the parties had only shown a mutual intention to fight, but there was great heat of blood."

The evidence in this case shows only manslaughter, if any offense. The parties were miners, all friendly; had been drinking together frequently, during the day, and were all more or less drunk. They left town in a wagon together, taking two bottles of whisky with them. The affray occurred over the whisky, sometime after leaving, about not giving one Tiberty—the only witness present—a drink. Deceased, a large, powerful man, had been choking defendant, who was small and weak; and said, when defendant was resisting, "you will choke, will you, you s—n of b—h," and raised his hand to strike him; but, separated by witness, when defendant immediately jumped out of the wagon, got his pistol and fired. Defendant's acquaintances, and the miners, characterized him as crazy, of very weak mind and subject to fits or spells.

Tiberty, the only witness present, was as drunk as the

others, and his statements are so contradictory and indefinite as to show he did not know what actually occurred, and was not in a position to see; he was at the head of the horses, trying to prevent their running away. It was all one affray, from beginning to end, and certainly did not occupy more than one or two minutes; not five at the farthest, and while defendant was in great passion and heat of blood. There was no time for blood to cool, or passion to subside.

Where death ensues in the heat of blood, although a deadly weapon is used, it is only manslaughter.

2 Wharton, Cr. L. 974.
Wharton on Homicide, 189, 987, 990, 992.

A blow or blows are a just cause for provocation.

Commonwealth v. Drum, 8 Smith, 1 Penn. Oyer & Terminer.
Commonwealth v. Drum, 58 Penn. State.

Cooling time may be one hour or half a day.

2 Bishop, 712.

The statutes of Utah provide that where "the verdict is contrary to law or *evidence*," defendant may move for a new trial; and if denied, an appeal may be taken to the Supreme Court of the Territory, and from said court, on writ of error, to this court.

P. 127, Laws 1878, Sub. 6.

The instruction that the "question of insanity depended on defendant's ability to distinguish between right and wrong," was error.

Parsons v. State Alabama, decided July, 1887.
Albany Law Journal, Sept. 14, 1887, p. 249.
State v. Pike, 49 N. H., 399.
State v. Jones, 50 N. H., 369.
18 Texas, 287.
31 Ill., 385.

The judgment entered by the court in this case provides that defendant shall be "*publicly*" executed. The statute is, that "judgment of death must be executed within the walls or yard of a jail, or some convenient *private* place, etc."

Sec. 356, p. 136, Laws 1878.

We further call the attention of the court, to the able dissenting opinion of Justice Henderson, of the Supreme Court of Utah, in this case, and submit that a new trial should be granted.

ARTHUR BROWN,
Counsel for Defendant.

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE TERRITORY OF UTAH,
Respondents,
vs.
ANDREW CALTON,
Appellant.

This is a criminal case where the defendant was indicted and convicted of murder in the first degree, and sentenced to be shot. He had no means to employ counsel to defend him, prepare for trial, or bring witnesses for his defense, and depended upon the mercy of the court. The court appointed counsel, who appeared and conducted his defense—without compensation—and after conviction, prepared the bill of exceptions, and argued his appeal in the Supreme Court of the Territory of Utah, and prepared brief therefor, all at their own expense. After the decision, counsel sued out writ of error, which was allowed, and the case is now before this court on said writ.

STATEMENT OF THE CASE.

On the fourteenth day of July, 1887, defendant, and deceased, and one Tiberty, were at Milford together; up to that time all had been friends, and during the day they were all drinking frequently together, and were more or less drunk. They left town together in a wagon, taking two bottles of whisky with them. The affray occurred over the whisky, some time after leaving, about not giving the other person a drink. Defendant and deceased got into a quarrel, and commenced fighting. Deceased, a large, powerful man, had been choking *defendant*, who was small and weak, and said, when defendant caught hold of him and resisted, "you will choke, will you, you s–n of a b–h," and raised his hand to strike him

but was prevented by witness, when defendant immediately jumped out of the wagon, got his pistol and fired, killing deceased. Tiberty, the only witness present, was also drunk and did not know what occurred. After the killing defendant drove the wagon with the dead man back to Milford. It was only a drunken row, in which all were equally culpable. Deceased's brother, who was immensely wealthy, influential in the county, and hired the private prosecutor, W. H. Dickson, was present at the trial.

The questions involved are, was it pure and deliberate murder, or was the verdict rendered through passion and prejudice and the influence of the relatives and friends of deceased.

ERRORS ASSIGNED.

1st. Defendant had no time for preparation for trial.

2nd. The court allowed one W. H. Dickson, private counsel hired by a private prosecutor, to appear and prosecute said case, no reason appearing therefor. (Argued fully in brief.)

3rd. The court erred in allowing said Dickson, private prosecutor, to close the argument to the jury—contrary to the statutes of Utah. (See brief.)

4th. The court erred in its instruction to the jury No. 27.

5th. Also the instruction as to manslaughter.

6th. And the instruction as to insanity.

7th. One of the questions involved in this case is, will the court review the evidence that the verdict is contrary to the law or evidence—is one of the grounds for a new trial and appeal under the laws of Utah. This court will therefore review the evidence so far as to determine if error was committed by the jury in their verdict, and by the court in refusing to set aside the verdict on that ground.

8th. The court erred in sentencing defendant to be publicly executed instead of private.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 1,408.

ANDREW CALTON, Plaintiff in Error,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

In Error to the Supreme Court of the Territory of Utah.

JOHN H. MITCHELL,
Counsel for Plaintiff in Error.

Thomas McGill & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1888.

ANDREW CALTON, Plaintiff in Error,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH. } No. 1,408.

In Error to the Supreme Court of the Territory of Utah.

Brief of John H. Mitchell on Behalf of Plaintiff in Error.

By permission of this Honorable Court and of Mr. Assistant Attorney-General William A. Maury, representing the people herein, I beg respectfully to submit this supplementary brief in the above-entitled case, which it is prayed may be considered in connection with the brief heretofore filed herein by Mr. Arthur Brown, counsel for plaintiff in error.

In addition to the errors assigned in the brief of Mr. Brown the following errors are now assigned:

1st. The Court erred in the following charge to the jury, marked No. 9, p. 58, printed record:

"If you believe from the evidence beyond a reasonable doubt that the defendant at the time and place specified in the indictment did, willfully, unlawfully,

maliciously, but without deliberation or premeditation, shoot and kill the said Cullen in manner and form as charged in the indictment, your verdict should be that the defendant is guilty of murder in the second degree;" and

2d. The Court erred in the following charge to the jury, marked No. 10, p. 58, printed record:

"The distinction between the two degrees of murder so far as applicable to this case is, that in murder of the *first* degree the killing must be *deliberate* and *premeditated*, whilst in murder of the *second* degree the killing is *not* deliberate *or* premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind before the mortal wound was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice."

In other words, the Court erred in its definition to the jury of the crime of murder in the *second* degree. This question will first be considered before passing to the assignments of error contained in the brief of Mr. Brown.

It is respectfully and confidently submitted that the Court below—the trial court—as also the Supreme Court of the Territory, erred in holding that the element of "*premeditation*" is *not* necessary to constitute the crime of murder in the *second* degree; upon the contrary, it is respectfully insisted that in order to constitute a homicide murder in the *second* degree under the laws of the Territory of Utah, the elements of both *malice* and *premeditation* must exist.

The act must be done, in other words, not merely with *malice*, which term does not of itself include *premeditation*, but with "*malice aforethought*," or *malice prepense*, either and both of which terms include *necessarily* the ingredients of both *malice* and *premeditation*, but not necessarily the ingredient of *deliberation*.

The Statutes of Utah Territory.

Murder in the first and second degrees is defined as follows by the statutes of Utah Territory. (See Compiled Laws of Utah, 1876, p. 585, Ch. 1):

"Sec. 87. Murder is the unlawful killing of a human being with *malice aforethought.*

"Sec. 88. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart.

"Sec. 89. Every murder perpetrated by poison, lying in wait, or any other kind of willful, *deliberate*, malicious, and *premeditated* killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; *and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree.*"

It will be observed by the Court that no homicide under the statutes of Utah can be murder in the *second* degree, unless such homicide was committed under such circumstances as would have constituted *murder at common law.* It becomes necessary, therefore, in order to properly construe the statutory definition of murder in the second degree in the laws of Utah, in its application to this case, in view of the charge of the Court, to inquire whether or not at common law a murder could be committed in which neither the elements of "*deliberation*" nor "*premeditation*" entered.

Murder is defined by Sir Edward Coke (3 Inst., 47) as follows:

"Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace with *malice aforethought.*"

And this is the common-law definition of murder as laid down by all the writers. The killing, it will be observed, in order to constitute murder at common law, must be more than killing with malice simply; the killing must be "with malice *aforethought,*" which includes in its definition both "malice" and "premeditation." "Premeditatedly" means "thought of beforehand any length of time, however short." The terms *deliberation* and *premeditation* are not synonyms in meaning. A *deliberate* act is one done in a cool state of the blood—that is, not in a heat of passion caused by provocation; while an act done with "premeditation" simply, means that the act done was thought of beforehand. Each of these—that is to say, a homicide—that was unlawful, willful, premeditated, deliberate and malicious, and one that was simply unlawful, malicious and premeditated, constituted *murder* at common law.

The statutes of Utah declare the first of these, or a killing that is unlawful, deliberate, premeditated and malicious, murder in the first degree; while they in substance and effect declare that a killing that is unlawful but *not* deliberate, but is *premeditated* and *malicious*, is murder in the second degree.

The statutes of the different States are very strangely contradictory in their definition of murder in the second degree. Those of Utah Territory and the State of Missouri are in substance and effect *identical.* We may, therefore, with propriety consult the adjudications under the code of Missouri in considering this case.

The Missouri Statutes.

The statute of the State of Missouri, Par. 1, Art. 2,

Wag. Stat., 445, which defines the crime of murder in the first and second degrees, is identical with the statutes of Utah Territory on that subject. The Missouri statute, sec. 1, Wag. Stat., 445. defines murder of the first degree as follows:

"Every murder which shall be committed by means of poisoning, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree."

And by section 2 of the same act, murder in the *second* degree is defined as follows:

"All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."

The Supreme Court of the State of Missouri, in defining murder in the second degree under this statute, have in numerous cases, and uniformly, held, in able and well-considered opinions, that in order to constitute murder in the *second* degree, the wrongful killing must be not only with *malice*, but with *premeditation;* and the case, moreover, must be one in which the element of deliberation does not necessarily enter.

The State *v.* Wieners, 66 Mo., p. 14.
The State *v.* Curtis, 70 Mo., 595.
The State *v.* Robinson, 73 Mo., p. 306.
The State *v.* Erb, 74 Mo., 199.
The State *v.* Ellis, 74 Mo., 216.
Keenan *v.* Com., 44 Penn., St. Rep., 55.
People *v.* Vance, 21 Cal., St. Rep., 400.

In the case of the State *v.* Curtis, *supra*, the trial Court charged the jury on the subject of murder in the second degree as follows:

"4th. The jury are instructed, if they believe from all the facts and circumstances beyond a reasonable doubt that the defendant willfully and with his malice aforethought, but without deliberation or premeditation, stabbed and killed the deceased, Charles Powell, as charged in the indictment, * * * then they will find him guilty of murder in the second degree. * * *. The jury are instructed that murder in the second degree is the wrongful killing with malice aforethought, but, as stated above, *without premeditation and deliberation.* It is where the intent to kill is in a heat of passion and executed the instant it is conceived, or before there has been time for passion to subside."

The Supreme Court of the State, in considering this instruction, remarked as follows:

"The fourth instruction given on behalf of the State is erroneous. It is contradictory and calculated to mislead. There is no murder in the *second* degree, under our statute, *without premeditation.* No homicide can be murder in the second degree which was not murder at common law. The statute so declares. (Wag. Stat., p. 446, Sec. 2.) To constitute murder at common law the homicide must have been committed 'wilfully and with malice aforethought,' or, as the statute of 23 Henry VIII, Chap. 1, Sec. 3, expressed it, 'of malice prepensed.' Now, the words *aforethought* and *prepensed* or *prepense* mean *premeditated*, or *thought of beforehand.* These words, thus explained, do not mean that malice should be premeditated, for, as was said in the State *v.* Wieners, (66 Mo., p. 20,) that would be absurd, as malice is only a condition of the mind, but they mean that the act which the party is prompted by his malice to commit should be premeditated or thought of beforehand, and if such act so prompted be homicide, then it must be premeditated. (Keenan *v.* Com., 44 Penn. St. Rep., 55.) The words 'with malice aforethought' are equivalent to the words 'with malice and premeditation.' (People *v.* Vance, 21 Cal., 400."

In the State *v.* Wieners, (66 Mo., 13,) the Court said:

"Premeditation and deliberation are not synonyms, and a homicide may be premeditated without being deliberately committed."

It was further held in that case, (State *v.* Weiners, *supra*,) says the Court in the case of The State *v.* Curtis, *supra*, "that murder in the second degree is such a homicide as would have been murder in the first degree if committed *deliberately*."

The Court, in The State *v.* Curtis, (70 Mo., 595,) sums up as follows:

"To make our meaning plain we will recapitulate our classification of intentional homicides.

"Where there is a willful killing with malice aforethought and deliberation—that is, with malice and premeditation, in a cool state of the blood—the offense is murder in the first degree.

"This definition is not intended to include cases in which specific acts are by statute made murder in the first degree.

"Where there is a willful killing with malice aforethought—that is, with malice *and* premeditation, but *not* with deliberation, or in a cool state of the blood—the offense is murder in the second degree.

"Nor can any homicide be murder in the second degree unless the act causing death was committed with malice aforethought—that is, with *malice and premeditation.*

"Where there is a willful killing without deliberation and not with malice aforethought, the offense is manslaughter."

In the case of The State *v.* Robinson, *supra*, the question as to what constituted murder in the second degree under the Missouri statute arose on the following charge to the jury:

"If the jury find from the evidence that the defendant feloniously, willfully, and maliciously, and *not* deliberately and premeditatedly, shot and killed James J. Robinson, they will find him guilty of murder in the second degree, and not guilty of murder in the first degree."

Instruction number 8, given for the State, is to the same effect.

The Supreme Court in discussing these instructions said:

"These instructions do not conform to the definition of murder in the second degree laid down in the State *v.* Curtis, 70 Mo., 594. It was distinctly stated in the opinion in that case that there can be no murder in the second degree without premeditation, a word which has uniformly been defined by this Court since the statute classifying murders has been in force in this State to mean 'thought of beforehand for any period of time, however short.' *Premeditation is a necessary constituent of murder in the second degree,* as there can be no murder in the second degree which was *not murder at common law,* and there can be no murder at common law unless the act causing death was committed with *malice aforethought,* that is, with *malice* and *premeditation.*"

The Court further said, in The State *v.* Robinson, *supra,* as follows:

"The Legislature certainly did not intend the words *premeditated* and *deliberate* to be construed as meaning *precisely the same thing.* The simple fact of the employment of both words, apart from other considerations, shows that one of them was intended to have a larger signification than the other, and this larger signification has in recent cases by this Court been assigned to the word *deliberate.*" (State *v.* Wieners, 66 Mo., 13; State *v.* Curtis, 70 Mo., 594.)

There being no degrees in murder at common law, we must, of course, in arriving at the true definition of murder in the *second* degree, under the laws of Utah, ascertain precisely what character of homicides *other* than those homicides which, by the laws of Utah, are declared to be murder in the *first degree,* can or do amount to *murder* under the *common law.*

The common law made no distinction betwixt the

guilt of the poisoner or the assassin who shot his victim from ambush, or the robber who killed for gain, and the man who, under the influence of passion, engendered by a real or supposed grievance, and without *deliberation*, but with *malice aforethought*, occasioned by insult or provocation, slew the supposed aggressor. The common sense of mankind makes a distinction, and regards the poisoner and assassin, who proceeds *deliberately* as well as with premeditation in his bloody work, with abhorrence and loathing; but, while condemning the act of the man who slays in the passion without sufficient cause, with *malice aforethought*, which involves *premeditation*, but *not deliberation*, regards him as far less criminal than the man who murders for gain, or poisons or assassinates for revenge. "To this common sense of mankind," says the Supreme Court of the State of Missouri, in The State *v.* Wieners, 66 Mo., 26, "our Legislature has yielded, and distinguished between such murders."

The Court, further proceeding in the above case, says:

"What, then, is murder in the *second* degree? It is where the intent to kill is in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside. We do not use the phrase 'heat of passion' in its technical sense, but as a condition of mind contradistinguished from a cool state of the blood. * * * Murder in the *second* degree is such a homicide as would have been murder in the *first* degree if committed *deliberately*. * * * *Premeditation* and *deliberation* are not synonyms, and a homicide may be *premeditated* without being *deliberately* committed."

In the case of the State *v.* Ellis (74 Mo., 208, *supra*) the Supreme Court said:

"In defining the term 'premeditatedly' the trial Court said 'it means thought of in the sense of thought over.' This is an erroneous definition, because it gave to *premeditation* an element of *deliberation*, which does not belong to it."

In case The State *v.* Lewis (74 Mo., 223) the Court said:

"The definition and instruction of the Court below were as follows: 'By the term *deliberately* is meant in a cool state of the blood, not in that heated state which the law denominates "*passion;*" and the passion here meant is not that which comes of no cause, but that and that only which is produced by some legal provocation.'"

"These instructions," says the Supreme Court, "are not in harmony with the definitions and doctrine on these subjects as laid down in a number of recent decisions of this Court." (State *v.* Wieners, 66 Mo., 13; State *v.* Curtis, 70 Mo., 594; State *v.* Sharp, 71 Mo., 218; State *v.* Simms, 71 Mo., 538; State *v.* Robinson, 73 Mo., 306.)

The phrase, "heat of passion," as used in the above authorities, in this connection, is not used in its technical sense, but to denote a condition of mind contra-distinguished from that cool state of the blood implied in the use of the term "deliberation;" and the "*passion*" there referred to is not limited to that heated state which comes from, and is produced only by some *legal* provocation, as seems to be stated in the latter part of the above definition in this case, which we think somewhat faulty and calculated to mislead.

In case The State *v.* Lewis (74 Mo., 223) one instruction of the Court below was:

"And if from the evidence you find that the defendant actually did the killing complained of, and find that it was not done deliberately, or if deliberately, not premeditatedly, and that it was done at the city of St. Louis, and in the manner and by the means alleged in the indictment, then you ought not to convict of murder in the first, but ought to convict him of murder in the second, degree."

The Supreme Court, referring to above, said:

"According to all the authorities above cited 'premedi-

tation' is an *essential element of every murder in the second degree.* The above instruction on that subject in this case, it would seem, allows a conviction without that ingredient. That is not the law. In the recent case of the State *v.* Robinson (73 Mo, 306) this Court passed upon an instruction substantially like this, and *expressly* held that there could be *no murder in the second degree without premeditation.*"

Chief-Justice Shaw, in Commonwealth *v.* Webster (5 Cush., 304), in defining the term murder, says:

"Murder, in the sense in which it is now understood, is the killing of any person in the peace of the Commonwealth with *malice aforethought*, either express, or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but *every other unlawful and unjustifiable motive.* It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, any thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief."

He further, in defining the term "*malice aforethought,*" says:

"It is not the less malice aforethought within the meaning of the law because the act is done *suddenly* after the *intention to commit the homicide is formed;* it is sufficient the *malicious intention* precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought' in the description of murder do not imply *deliberation* or the *lapse of considerable time* between the malicious intent to take life and the actual execution of that intent, but rather denote '*purpose and design*' in contradistinction to 'accident and mischance.'"

This definition is on a line with the decisions of the Supreme Courts of Missouri and Tennessee, *supra,* which are to the effect that while the element of *deliberation,*

which implies lapse of time, does not enter as an essential in the crime of murder at *common law*, that still, in order to constitute murder at common law, there must be *premeditation*; that is to say, the assassin must *think over* the matter to such an extent, although it may be it is true but momentary, as to cause him to intend to take life maliciously and without justification or excuse; and this intention must be the result of *malice* and *not* of *passion*, and this intent must be carried into actual execution. In other words, there must be *purpose* and *design*. There must be *premeditation prompted by malice*.

Bishop on Criminal Law (sec. 429) says:

"Malice aforethought is a technical phrase employed in indictments. * * * In opinions of courts and other law writings we frequently meet with language from which it might be inferred that the word '*malice*' alone signifies the same thing as '*malice aforethought*,' but the better use makes a distinction and assigns to the former a meaning somewhat less intense in respect of wickedness than the latter."

The Court, in Beauchamp *v.* The State, 6 Blackford, Ind. Rep., 1842, said:

"That to constitute '*malice aforethought*,' there should be a *formed design to kill*, * * * that '*malice aforethought*' means the *intention to kill*."

Bouvier, in his Law Dictionary, p. 140, says:

"Malice aforethought does not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote *purpose* and *design* in contradistinction to accident and mischance."

While, on page 449 of the same volume, the word "*premeditation*" is defined by Bouvier as "*a design formed to commit a crime, or to do some other thing, before it is*

done." Webster, in his unabridged, maintains the same well-defined difference in signification between the terms "*premeditation*" and "*deliberation.*" He says "*premeditate,*" Latin, "*praemeditari,*" from *Prae,* before, and *meditari,* to *meditate;* to think on, to contrive and *design previously.* "Premeditation," "previous contrivance; *or design formed,* as the premeditation of a crime."

* * * * * * *

While he defines the terms "*deliberate*" and "*deliberation*" as follows:

"Deliberate. Latin *deliberer, deliberatum,* from *de* and *Librare,* to weigh, from *libra,* a *balance;* to *weigh in the mind;* to *consider* and *examine,* the reasons for and against; to *consider maturely;* to *reflect upon;* to *ponder;* as to deliberate a question."

"*Deliberate,*" to take counsel with onesself; to *weigh the arguments* for and against a proposed course of action; *to reflect; to consider.* Not hasty or sudden; slow. Deliberately and with careful consideration; circumspectly; not hastily or rashly; slowly.

From all these definitions it is plain that the two terms are not *synonims* in meaning, although it is true that the word *deliberation* includes in its definition the meaning of both. Hence it follows that while *deliberation* is not a necessary element in murder at common law, it is necessary according to all of the decisions that a *design should be formed* to commit the crime, or to do some other thing before it is done, and this is the *precise* and *exact* meaning of the word "*premeditation.*" Therefore it follows that *premeditation* being an *essential element* in the crime of *murder* at *common law,* and also under the statutes of Utah in murder in the *second degree,* there was *error* in the charge of the trial Court to the jury in holding that neither element—deliberation *nor* premeditation—was necessary to constitute murder in the second degree.

The statutes of Pennsylvania and Michigan are somewhat different from those of Missouri and Utah. On this subject the Pennsylvania statute is as follows:

"All murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of deliberate, willful, and premeditated killing; or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; *and all other kinds of murder shall be deemed murder in the second degree.*"

Not, as will be perceived, all other kinds of murder at *common law*, as in Utah and Missouri, but "all other kinds of murder."

The statutes of Indiana, Ohio, Massachusetts, and New York are different. Neither of these makes any reference to the common law of murder, but defines specifically and *in terms* what shall constitute murder in the *first* degree, and what in the *second* degree. For instance, the Indiana statute, ~~in~~ after defining murder in the *first* degree, states:

"Killing purposely and maliciously, but without deliberation and premeditation, is murder in the second degree."

The statute of Ohio, says Bishop on Criminal Law, page 724, is essentially the same as this Indiana one.

Hence in these States it is clear that, by reason of the explicit terms of the respective statutes, murder in the *second* degree does not necessarily require either of the ingredients of *deliberation* or *premeditation*.

It will be seen also that by a specific provision in the statute of New York, as well as in Indiana, Ohio, and many other States, a killing, to be murder in the second degree, need not include the element of either *premeditation* or *deliberation*.

The statute of Massachusetts, after defining what shall constitute murder in the first degree, says:

"SEC. 2. Murder not appearing to be in the first degree is murder in the second degree."

Bishop on Criminal Law, Sec. 725, refers to the diversity of statutes on this subject in these words:

"The statutes are not in their terms so diverse as to render *all* general considerations of them unprofitable. Nor, on the other hand, are they so absolutely alike as to make the interpretation of *one* a necessary guide in all particulars to that of the rest."

The question, therefore, as to what character of homicide constitutes murder in the *second* degree in any given State or Territory, must be determined by a construction of the statutes of such State or Territory. The statutes of Utah and Missouri on this subject are *identical*. The Supreme Court of Missouri, as we have seen, has uniformly, and with much reason, held that the element of *premeditation* is an *essential* in that State to constitute murder in the *second* degree. If that is good law in Missouri, then it must be good law in Utah also. The trial Court of Utah charged the jury in this case that neither deliberation nor premeditation was an element or ingredient of murder in the *second* degree. The Supreme Court of Utah affirmed that ruling, and all this it is respectfully submitted was error.

MANSLAUGHTER.

It is respectfully submitted, the Court erred in its charge relative to the crime of manslaughter. The statutes of Utah define manslaughter as follows:

"An unlawful killing of a human being without malice."

It is classified as follows:

"Voluntary, upon a sudden quarrel or heat of passion."

And—

"Involuntary, in the commission of an unlawful act amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner." (Compiled Laws of Utah, 1876, Sec. 1921, p. 586.)

The above is substantially the common law definition of manslaughter.

Cooley's Blackstone gives the common law definition as follows:

"Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act."

Bk. 4, chap. 14, p. 190, sec. 191.

The court erred, it is respectfully submitted, in the following statement to the jury as to the meaning of the terms "*heat of passion*":

"The provocation must be such as to cause *irresistible* passion in the mind of a reasonable person. It must be such as to engender *uncontrollable* passion."

And, again, in the following charge to the jury on the same subject, being No. 27, p. 62, printed record:

"To reduce a homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to *irresistible* passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender *uncontrollable* passion in any ordinary man, will suffice."

It is submitted this is not a fair construction of the terms "heat of passion," and that the charge was misleading.

The State *v.* Hill, 4th N. Car. Rep., 495, 496.

Young *v.* The State, 11 Humphreys (Tenn.) Rep., 200.

Haile *v.* The State, 1 Swan (Tenn.) Rep., 250.

Hale's Pleas of the Crown, 466, note.
Maher *v.* The People, 10 Mich., 212.

The statutes of North Carolina, Tennessee, Michigan, and, in fact, most States, upon the subject of manslaughter are substantially identical with the statute of Utah on that subject and with the common law as well.

In the case of the State *v.* Hill, (4th Dev. & Batt.) *supra*, the Supreme Court of North Carolina, in discussing the meaning, or, rather, in describing the character and degree of that *heat of passion* which will reduce the grade of a killing from murder to manslaughter said:

"To avenge a blow the deceased attacked the prisoner with a knife—made three cuts at him and gave him a severe wound in the abdomen. If instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter, not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion *disturbed the sway of reason and made him regardless of her admonitions.* It does not look upon him as temporarily deprived of intellect, and, therefore, not an accountable agent, but as one in whom the exercise of judgment is *impeded* by the violence of excitement, and accountable, therefore, as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowing as for the time to *shut out knowledge and destroy volition.* All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the *furor brevis* renders a man deaf to the voice of reason, so that, *although the act done was intentional of death,* it was not the result of malignity of heart, but imputable to human infirmity."

In the foregoing case the trial Court had charged the jury, among other things, as follows:

"That if the prisoner gave the first blow, and was then cut by the deceased, although he might have been agitated by excitement and anger, yet if they collected from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and did the act intentionally, it was murder."

The Supreme Court held this was error, and said:

"This proposition, as we understand it, and as we must believe it to have been understood by the jury, we are very confident cannot be sustained. The proposition supposes that the first assault was made by the prisoner without malice, and that the fatal wound was given while under the influence of indignation and resentment, excited by the excessive violence with which he had been in turn assailed by the deceased—but it refuses to the prisoner the indulgence which the law accords to human infirmity suddenly provoked into passion, *if such passion left to him so much of deliberation and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary.*"

In Young *v.* The State, (11 Humph., Tenn., 202, *supra*,) the Court below charged the jury that "if the assault excited in the prisoner a sudden burst of passion, and for the time being *dethroned his reason*, and he shot and killed in this *whirlwind of passion*, it would be manslaughter."

The Supreme Court held this erroneous and misleading, and yet the terms used are, it is submitted, no stronger than the words "*irresistible passion*," and "*uncontrollable passion*," employed in the charge of the Court in the case at bar.

The Supreme Court of Tennessee in discussing the above instruction said:

"In reference to manslaughter, his Honor seems to us to speak of the '*dethronement of reason*,' and the '*whirlwind of passion*' in a way calculated to mislead. The

books say: 'Whenever death ensues from sudden transport of passion, or heat of blood, if upon reasonable provocation, and without malice, *or* upon sudden combat, it will be manslaughter. (East's Pleas of the Crown, 232; Foster, 313; Roscoe's Crim. Ev., 557.) There must be heat of passion, upon reasonable provocation, to negative the idea of malice, but we think the manner in which his Honor repeats * * * that *reason must be dethroned*, and that there must be a *whirlwind* of passion in order to mitigate a killing to manslaughter, was calculated to exclude from the jury the *possibility* that a *sane* man, having *sense* and *reason*, could, excited by anger, and heat of blood, be guilty of manslaughter. We think, therefore, that the impression his language was calculated to make on the minds of the jury was erroneous.'"

In the case of Maher *v.* The People, 10 Mich., 212, the Supreme Court, Christiancy, Justice, in discussing the question as to the extent that the passions must be aroused and the dominion of reason disturbed to reduce an offence from murder to manslaughter, said:

"But if the act of killing, though intentional, be committed under the influence of passion, or in the heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of the reason *was disturbed*, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offence as of a less heinous character than murder, and gives it the designation of manslaughter.

"To what extent the passions must be aroused and the dominion of reason disturbed to reduce the offence from murder to manslaughter, the cases are by no means agreed; and any rule which would embrace all the cases that have been decided in reference to this point, would come very near obliterating, if it did not wholly obliterate, all distinction between murder and manslaughter in such

cases. We must, therefore, endeavor to discuss the principle upon which the question is to be determined. *It will not do to hold that reason should be entirely dethroned, or overpowered by passion so as to destroy intelligent volition.* (State *v.* Hill, 1 Dev. & Bat., 491; Haile *v.* State, 1 Swan, 248; Young *v.* State, 11 Hump., 200.) Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offence; as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured, *must be considerably short of this*, and never beyond that degree *within which ordinary men have power, and are, therefore, morally, as well as legally, bound to restrain their passions.* It is only on the idea of a violation of this clear duty that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been, in a great measure, overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

"The principle involved in the question, and which, I think, clearly deducible from the majority of well-considered cases, would seem to suggest, as the true general rule, that *reason* should, at the time of the act, be *disturbed* or *obscured by passion* to an extent which *might render* ordinary men, of fair average disposition, *liable to act rashly*, or without due deliberation or reflection, *and from passion, rather than judgment.*"

The Supreme Court of Michigan further, in the case of Maher *v.* The People, *supra*, discussed at some length and with clearness the question as to what may be considered in law a reasonable or adequate provocation for such passion as will reduce a homicide committed under its influence from the grade of murder to manslaughter, and, among other things, said:

"To the question, what shall be considered in law a reasonable or adequate provocation for such a state of mind, so as to give a homicide, committed under its in-

fluence, the character of manslaughter; on principle, the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them—not such a provocation as must, by the laws of the human mind, produce such an effect with the *certainty that physical effects follow from physical causes;* for then the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation, in every case, be held sufficient or reasonable because such a state of excitement has followed from it; for then, by habitual and long-continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of that very wickedness of heart which, in itself, constitutes an aggravation both in morals and in law."

"In determining whether the provocation is sufficient or reasonable, *ordinary human nature,* or the average of men recognized as men of fair average mind and disposition, should be taken as the standard—unless, indeed, the person whose guilt is in question be shown to have some *peculiar weakness of mind or infirmity of temper,* not arising from wickedness of heart or cruelty of disposition."

It may be observed in passing, moreover, that the Court in the case just cited, and it would seem reasonable and proper, would not apply as strong a test in a particular case where the prisoner is shown to have some *peculiar weakness of mind, or infirmity of temper,* as would be applied where no such element existed in the case.

The testimony in the case at bar, while perhaps not sufficient to justify a verdict of not guilty on the ground of insanity, does show very plainly that the prisoner was afflicted, and had been for years, with a *peculiar weakness of mind* and *infirmity of temper,* which fact, in connection with the other conceded fact, that he was very much under the influence of liquor, ought not to have been lost sight of by the Court below, as it seems to have

been, in defining to the jury the character of the heat of passion that would in this case reduce the homicide from murder to manslaughter. (See printed record, pp. 43 to 57, inclusive.)

In State *v.* Holme, (54 Missouri,) the Supreme Court said:

"It is true that if a homicide be committed under the influence of passion, or in heat of blood produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than any wickedness of heart or cruelty or recklessness of disposition, the offense is manslaughter only, and not murder. But to reduce the offense to this grade, the *reason* must at the time of the act be *disturbed or obscured by passion* to an extent which *might* render a *reasonable* man *liable* to act rashly, without deliberation, and from passion rather than judgment. Therefore the cause of provocation must generally occur in the presence of the injured party, for then the law presumes that he acts upon a sudden impulse, without deliberation, and before the blood has time to cool."

In this case the opinion in Maher *v.* The People, (10 Mich., 212,) commented on and approved.

In the *casus celebre* Commonwealth *v.* Webster (5 Cush., 304) the doctrine of the law of manslaughter and the meaning of the words "sudden combat" and "heat of passion" were fully discussed by Chief-Justice Shaw. On page 307 the Chief-Justice says:

"The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired by a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is

regarded as done through heat of blood, or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of violence."

The Chief-Justice then proceeds to state a case directly applicable in every essential particular to the case at bar, when he says:

"The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without regard to who is the assailant, it is a *mutual combat.* And if no unfair advantage is taken in the *outset,* and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as *homicide in the heat of blood,* and though not excusable, because a man is *bound to control his angry passions,* yet it is not the higher offense of murder."

Here, it will be observed, Chief-Justice Shaw declares that a man is *bound to control his angry passions.* If the heat of passion, therefore, that must exist in order to reduce murder to manslaughter, must be *irresistible* and *uncontrollable,* as charged by the Court in this case, then it would be folly to hold that a man is *bound to control such a passion.* If that be the character of the passion he is bound to control, then the law is strangely anomalous and ridiculous in this, that a man must *control* a *passion* that is both *irresistible* and *uncontrollable.* Otherwise he is guilty of a high crime.

Chief-Justice Shaw, continuing, (in Commonwealth *v.* Webster, *supra*), says:

"On the other hand, if death, *though wilfully intended,* was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault or other provocation on his part, which

the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter."

It will be observed Chief-Justice Shaw does not declare that the angry passion must be one that is *irresistible*, or one that is *uncontrollable*; upon the contrary, he states the very reverse of this when he says a man is *bound to control such a passion*. He states, moreover, that the killing under such circumstances may be "*wilfully intended;*" that is to say, a man influenced by this *heat of blood* and this *angry passion* may still have *full control of his will power*, and may *wilfully intend to kill*, and *may kill*, still the crime is *not* murder, but manslaughter, because the intention to kill is formed, not through malice, but through passion.

In view, therefore, of the authorities, *supra*, and of reason, it is respectfully submitted this construction of the trial judge of the terms "*sudden quarrel*" *and* "*heat of passion*" was incorrect and mistaken and resulted in this case unquestionably in a verdict not warranted by either the law or the evidence.

"The provocation," said the trial judge, and his ruling was affirmed by the Supreme Court of the Territory, "must be such as to cause *irresistible passion* in the mind of a reasonable person." "It must be such," said the judge to the jury, "as to engender *uncontrollable passion*"; in other words, the charge of the court was to the effect that unless the *state* of the *passion* of the defendant at the time of the killing was such as to entirely *destroy volition*, and hold in absolute *captivity* the judgment, and reason, and will of the prisoner, that *then* his act was one of *murder*, and not *manslaughter*. The charge was that no *state of passion* in the prisoner, however *heated*, however aggravated, prompted by whatever provocation, unless it was

such as to be beyond the control of the prisoner by the most earnest and energetic effort on his part, could reduce the grade of crime from murder to manslaughter. The fair construction of the charge of the court is that unless the state of the passion of the prisoner was such as to temporarily at least dethrone reason and destroy intelligent volition, although however heated the blood or violent the passion may have been to a degree *less* than this, that then the act of the prisoner was *murder* and *not* manslaughter. The effect of the charge was that unless the prisoner was environed by an *irresistible storm of passion*, by an *uncontrollable whirlwind of anger*, by a state of mind that held judgment and reason and will, easy and sure captives; unless all power of volition was absolutely detroyed, that then the homicide, unless in self defense, was *murder* and *not* manslaughter.

The plain effect of the charge of the Court was to declare virtually that manslaughter ~~was~~ no crime, or at least that the act of killing a human being could not be reduced from the crime of murder to manslaughter unless such killing was done while the homicide was possessed of a *passion* however heated that was absolutely irresistible and absolutely beyond his control. The crime of manslaughter is no *minor* offense. It is a *high crime;* it is a felony both at common law and by statute. It was punished at common law the same as murder, except that the offender was entitled to the benefit of clergy, when the murderer *was not.* To hold that in order to reduce an act of killing from the crime of murder to manslaughter, the homicide should, when committing the act, be *manacled* and held imprisoned by a *passion* that is *irresistible and uncontrollable* is to declare either that manslaughter is no crime, or else that it is a crime to commit an act that is not the result of intelligent volition, not the act of the judgment, or will, or reason, or intention, of the party to any extent whatever, but rather the result of an imprisoned mind of an *insane* and irresponsible person.

What then *is* meant by the phrase "*the heat of passion*"? Does it mean that the passion is of that character that is *irresistible* and *uncontrollable*. I think that it does not, and that the trial jury and Supreme Court of Utah, in holding that it is, committed a most grievous mistake in a case involving the life of a human being. It is respectfully insisted that the reasonable and fair construction of the terms "*heat of passion*" is *this* and nothing *more* than *this;* that at the time of the killing the *passion* of the prisoner should be disturbed or excited as the result of an adequate provocation to an extent which *might* or probably would render an *ordinary man* of fair average disposition, *liable* to act rashly, or without due deliberation or reflection, and from passion, rather than judgment; and *this* should have been the charge to the jury rather than the charge that *was* given to the effect that in order to reduce the crime from murder to manslaughter the *passion* should have been *irresistible* and *uncontrollable*. To hold that a man should be held to be guilty of a *felony* for and on account of an act committed by him while influenced and controled by a passion which is *irresistible* and *uncontrollable* on his part, is to *hold* that a man is punishable by an ignominious punishment as for a *felony* for an act committed by him under an impulse and uncontrollable passion; when the judgment, and reason, and will were held captives by a *passion* that was uncontrollable and irresistible.

As to what is meant by heat of passion see Lawson's Criminal Defences, Vol. 5, pp. 1189–90; 1 Hay, 429; 1 Am. Dec., 564; The People *v.* Freel, 48 Cal., 437.

In the case of People *v.* Creel, 48 Cal., *supra*, the Supreme Court said:

"Whether the homicide amounts to murder or to manslaughter merely does not depend upon the presence or absence of the *intent to kill*. In either case there may

be a present intention to kill at the moment of the commission of the act, but when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element of the crime of murder."

The law has been settled in some of the States, notably North Carolina, that the question as to what is a sufficient cooling time is a question of law to be decided by the Court, and not a question for the jury. (See State *v.* Moore, Lawson's Adjudged Cases on Defence to Crime, Vol. 5, p. 1109.)

The weight of authority is, perhaps, to the contrary.

It is assigned as error in this case that "the verdict is contrary to law and evidence." See Mr. Brown's Brief, page 7.

The plaintiff in error was convicted of murder in the *first* degree. *Premeditation* and *deliberation* were both necessary ingredients to justify such a verdict. If, then, there is *no* evidence sufficient to go to a jury upon the question of *premeditation* and *deliberation*, then the decision of the jury is clearly erroneous *in law*, and this Court has not only the power, but it is its duty, to set aside the verdict.

McCann *v.* People, Sup. Ct., N. Y., Lawson's Adjudged Cases, Defences to Crimes, vol. 5, p. 1089.

In the case at bar the deceased and prisoner were friends until within a few moments of the killing. They were both partially intoxicated. They engaged in a fight over a bottle of whiskey. The prisoner was severely choked by the deceased, when, releasing himself from

his grasp, he, in a drunken frenzy and heat of passion, grasped a pistol which *happened* to be within his reach and shot deceased. It was a homicide occurring in a *sudden quarrel* and in *heat of passion.* There was no time for passion to subside or the blood to cool. There is not, among the many cases on record, a solitary case that I have been able to find, where, under such circumstances, it has been held by either Court or jury that there was a sufficient cooling time. Nor can the fact that the prisoner used a deadly weapon, under the circumstances of this case, be regarded as evidence of malice.

As to the use of a deadly weapon in the heat of passion, see—

Regina *v.* Smith, Horrigon & Thompson, Cases on Self-Defence, 130.

Commonwealth *v.* Dunn, 8 Smith (1), Penn., Horrigon & Thompson, Cases on Self-Defence, p. 185.

A statement of the facts of this case, as required by the rules of the Court, will be found on pages 9 and 10 of the brief of Mr. Brown.

For a statement of the various errors assigned and relied upon in this case, and not mentioned in this brief, and for the authorities and arguments in support thereof, reference is here made to the brief of Mr. Brown.

In response to the suggestions contained in the brief of Mr. Assistant Attorney-General Maury, it is respectfully submitted:

1st. That the position assumed on page 2 in reference to the alleged lack of exception upon the part of the defendant's counsel in the Court below cannot be maintained, nor are the rulings of this Court in the case of Beaver *v.* Taylor (93 U. S., p. 54), cited by Mr. Maury,

applicable to this case. The record in this case conforms strictly to section 315 of the laws of Utah (Laws 1878, p. 126) which provides as follows:

"Sec. 315. When written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with endorsements showing the action of the Court, form part of the record, and any error in the decision of the Court therein may be taken advantage of on appeal in like manner as if presented in a bill of exceptions."

In this case all the charges, both given and refused, were in writing and they appear in full, respectively, in the record before this Court—in fact all of the proceedings in the Court below, including all the testimony taken, are contained in the record now before this Court. It is submitted therefore confidently that if any error fatal to the case should appear in any portion of this record, it can be taken advantage of at this time on a proper assignment of error.

The answer to the arguments of the Assistant Attorney-General presented on the assignment of error in reference to the appearance of private counsel W. H. Dickson, has been mainly anticipated by suggestions contained in the brief of Mr. Brown, while that in reply to the arguments of the Assistant Attorney-General in answer to the fourth and fifth assignments of error will be found in this brief.

In response to the arguments in reference to the sixth assignment of error, it is respectfully submitted that there is considerable evidence in the record tending to show that the prisoner was subject to such delusions and conditions of mind and disposition which made it improper for the Court in charging upon the question of insanity to apply to this case the "right and wrong" test, at least unless the charge had been qualified by

such further charge as the evidence referred to would seem to indicate as applicable and important.

In conclusion, it is submitted confidently that there is fatal error in the judgment of the Court in directing that the accused "should be *publicly shot*," when, by the laws of the Territory, public executions are forbidden. The statute is that "judgment of death must be executed within the walls or yard of a jail or some convenient *private place*," &c. (Laws 1878, Sec. 356, p. 136.)

The Assistant Attorney-General insists that this may be treated as a *clerical mistake*, which may be corrected by the Court that pronounced the judgment. It is insisted this cannot be done; that this error, flagrant and fundamental as it is, can no more be regarded as a clerical mistake than could one necessarily resulting, had the judgment directed that the prisoner should, on a certain day, be publicly thrown into the waters of Salt Lake and drowned, or publicly burned in the public square of the city, or that he should, on a certain day, be taken to the Synagogue, and in the presence of the congregation beheaded. The judgment of the Court may be a mistake, but it is at the same time a *flagrant error* in the judgment of a Court in a case of life and death; and, while it may not be very material to a person condemned to death, whether he be shot, or drowned, or scalded to death, or beheaded, stricken with electricity, or hanged by the neck until he is dead, the public—the people—have an interest in every case involving the prosecution, conviction, and *execution* of a person charged with a crime involving human life, and the laws of Utah, as well as those of all civilized States, studiously recognize and guard this interest. The people of Utah have decided that the interest of the public generally, and the public morals, require that executions in that Territory shall *not* be *public*, but *shall be private*. Hence it is respectfully submitted that the judg-

ment of the Court in this case, directing that the prisoner shall be *publicly shot*, is an error which can only be properly corrected by a reversal of that judgment and a new trial.

All of which is respectfully submitted.

JOHN H. MITCHELL,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

ANDREW CALTON, PLAINTIFF IN error,
vs.
THE PEOPLE OF THE TERRITORY of Utah.
} No. 1408.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE DEFENDANTS IN ERROR.

WM. A. MAURY, *Assistant Attorney-General.*

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

ANDREW CALTON, PLAINTIFF IN error,
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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE DEFENDANTS IN ERROR.

The plaintiff in error was indicted in the second judicial district court of the county of Beaver, Utah, for the murder of Michael Cullen, and was convicted of murder in the first degree and sentenced to be shot on the 26th of November 1887 (p. 72).

A motion was made by the prisoner, before judgment, to set aside and vacate the verdict

herein, and for a new trial on the grounds, first, that the court misdirected the jury in matters of law and erred in the decisions of questions of law arising during the course of the trial; second, that the verdict is contrary to law and evidence (p. 63).

This motion being overruled, the defendant then and there duly excepted, and the case was carried to the supreme court of the Territory on an appeal from the judgment overruling the motion. The only exception taken in the case was to this judgment overruling the motion to set aside the verdict and grant a new trial.

It is difficult to see how this record can be made to square with the settled practice of this court that where the rulings of the trial court are excepted to in mass, the judgment will be affirmed if any one ruling be tenable. (*Beaver* v. *Taylor*, 93 U. S., 54, and cases cited.)

It would seem that the course pursued in the court below was in accordance with the following provision of the code of criminal proceedure of the Territory:

SEC. 315. When written charges have been presented, given, or refused, the questions presented in such charges need not

be excepted to or embodied in a bill of exceptions, but the written charges, or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions. (Laws, 1878, p. 126.)

It may be that in a capital case the court will not adhere to the established practice.

On the 18th of February, 1888, the judgment was affirmed by the supreme court of the Territory (p. 77).

It is the validity of the last-named judgment that is brought in question by this writ of error.

It is proposed to consider the assignments of error in their order.

FIRST.

This assignment, namely, that the "*defendant had no time for preparation for trial*," would seem clearly unfounded under the invariable practice of this court never to review rulings as to matters that reside peculiarly within the discretion of the trial judge, such as granting and refusing new trials and amendments of pleadings (*U. S.* v. *Buford*, 3 Pet., 32). It would seem hardly open to argument that the ruling of the court below as

to the allowance of time forthe prisoner's preparation for his trial belongs to the same category as rulings touching amendments and new trials.

To be sure an arbitrary judge might allow so short a time as to be a practical denial of the right to make a defense, just as a State legislature may impair a remedy to such a degree as to impair the obligation of the contracts the remedy should enforce, "for," says Lord Coke, "want of remedy and want of right is all one." (Co. Litt., 95 *b*.) Bu no such abuse of discretion is pretended here.

In this case the indictment was filed the 9th of September, 1887, pp. 75–76; the prisoner was arraigned the 10th September, and the same day counsel were assigned him by the court (pp. 74, 75), and the 14th September the prisoner pleaded not guilty (p. 74), and the case was called and the trial begun the 22d September (p. 1). No application was made by the prisoner to have the time extended, and no suggestion is offered of any particular wherein the prisoner was preju-

diced by the shortness of the time. For aught that appears the time allowed was ample for all the preparation the prisoner had to make.

It is, furthermore, manifest that the failure of a prisoner to make an objection in the trial court must, on a writ of error, be taken to be a waiver of the objection in a matter not fundamental in character. Any other principle of procedure would embarrass the administration of criminal justice to a serious extent. (*Comm.* v. *Stowell*, 9 Met., 572; *People* v. *Bealoba*, 17 Cal., 389; *McCorkle* v. *The State*, 14 Ind., 39.)

SECOND.

The next error assigned is that "the court allowed one W. H. Dickson, private counsel hired by a private prosecutor, to appear and prosecute said case, no reason appearing therefor."

It is proper to say that there is nothing in the record to show Mr. Dickson's relation to the case except the statement (p. 1), "C. W. Zane, assistant United States prosecuting attorney, and W

H. Dickson, of counsel, appearing for the prosecution." Whether Mr. Dickson appeared by the request of the counsel for the Government or as counsel retained by a private prosecutor and merely by permission of the district attorney is not stated in the record, and the fact, if material, can not be derived from the brief of the plaintiff in error.

The record shows that Mr. Zane, the assistant district attorney, opened the argument to the jury and that, after argument by the counsel for the prisoner, Mr. Dickson "closed the argument for the people" (p. 1).

It is upon the Territorial statute regulating criminal procedure that this assignment of error is based.

The statute provides as follows:

SEC. 257. The jury having been impaneled and sworn, the trial must proceed in the following order:

(1) If the indictment is for felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.

(2) *The prosecuting attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment.*

(3) The defendant or his counsel may then open the defense and offer his evidence in support thereof.

(4) The parties may then, respectively, offer rebutting testimony only, unless the court, for good reason, in furtherance

of justice, permit them to offer evidence upon their original case.

(5) When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides without argument, *the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude, the argument.* (Laws of Utah, 1878, p. 115, § 257.)

The record shows (p. 1) that the argument to the jury was opened by Mr. Zane, the assistant United States district attorney, who appeared by virtue of the following provision of the 2d section of the act of Congress of the 24th June, 1874 (18 Stat., 253), known as the Poland act:

That it shall be the duty of the United States attorney in said Territory, in person or by an assistant, to attend all the courts of record having jurisdiction of offenses as well under the laws of said Territory as of the United States, and perform the duties of prosecuting officer in all criminal cases arising in said courts, and he is hereby authorized to appoint as many assistants as may be necessary, each of whom shall subscribe the same oath as is prescribed by law for said United States attorney, and the said appointment and oath shall be filed and remain in the office of the clerk of the supreme court of said Territory.

Thus far, then, there was conformity to the Territorial law.

Was that law violated by Mr. Dickson in concluding the argument to the jury? Clearly not, it would seem. If it had been the intention that the concluding argument should be made by the prosecuting attorney the law would have said he *must* conclude, if any concluding argument was

made, just as it had said he "*must* open" the argument to the jury, if any opening argument was deemed necessary, or if the accused did not submit his case without argument.

It is to give a very radical and unreasonable sense to the law to say that if a concluding argument to the jury is made it *must* be made by the prosecuting attorney, and that the words "and the prosecuting attorney *may* conclude the argument" must be read as though the legislature had said that *if a concluding argument is made it must be made by the prosecuting attorney.*

We maintain that the more reasonable view is that the legislature meant by the use of the auxiliary "*may*" to recognize the well-established practice in this country of allowing the prosecutor to be represented by private counsel—a practice which is in harmony with the inveterate Anglo-American prejudice against committing prosecutions for offenses unreservedly to an official prosecutor.

But the construction insisted on is at war with what has been laid down in California un-

der a statute couched in the same language. (*People* v. *Strong*, 46 Cal., 302; *People* v. *Murphy*, 47 ib., 103.)

It is no answer to say that by section 258 (Laws of Utah, 1878, p. 116) it is provided that "when the state of the pleadings requires it, or in any other case, for good reasons and in the sound discretion of the court, *the order of argument prescribed in the last section may be departed from;*" for this provision concerns only the *order* of the argument, and gives no power to the court to allow counsel to take part in the trial who are not otherwise authorized to do so.

Upon an issue of fact under a jurisdictional plea, or a plea in abatement, the accused would have the affirmative, and open and close the argument, and that is what the statute means when it speaks of the state of the pleadings requiring a departure from the prescribed order of argument. Then, again, the court may be satisfied that the interests of justice require a change in the order of argument; for example, the whole force of the prosecution may be reserved for the concluding

argument, and the opening argument may have been unfair or inadequate. In such a case the court could with propriety give the accused the right to conclude. But section 258 (*supra*) gives the courts no dispensing power over section 257 (*supra*) as to counsel authorized to represent the people.

But we maintain that the second section of the act of 1874 (*supra*) has repealed the above quoted provisions of the Territorial law, and that the United States attorney and his assistants are untrammeled by this Territorjal legislation. It occupies the same ground as the Territorial law, and so upon the well established rule overlays it.

But it is argued that under this act of 1874 no one but the district attorney and his assistants can represent the prosecution in criminal cases. And it is said with confidence that the record shows that Mr. Dickson *only* appeared for the people in the supreme court of the Territory (Bf., p. 4).

But the record does not support the statement. The entry is, "This cause coming on regularly for hearing, W. H. Dickson's name was *added* as

of respondents' counsel, and thereafter the cause argued by Presley Denny for appellant; Mr. Dickson for respondents" (p. 77). To what was Mr. Dickson's name added, if it was not to that of the district attorney or his assistant? The record is entirely consistent with the fact that the regular prosecuting officer was in court and in charge of the case, although he left the argument to Mr. Dickson. The presumption of his presence in court must stand.

But to this argument upon the act of 1874, it is enough to quote in reply the language of Chief-Justice Sharkey in *Byrd* v. *The State* (1 How. Miss., 250), in a case where the prosecuting attorney withdrew entirely from the prosecution and left the management of the case to Mr. S. S. Prentiss, with the permission of the trial court. Said the learned judge:

> It is true that the district attorney is the officer appointed to prosecute, and, so far as official acts in prosecutions are required by law to be done in a particular way, or to assume permanent character, he is required, and, indeed, the only one authorized to discharge such duty; for instance, the indictment must be signed by him, and all other proceedings when an official act on the part of the state is necessary. But when all the preliminaries to trial have been duly performed, I do not think it error that other counsel should appear on the trial in his stead. Nor do I think the authorities relied on in support of this position show the existence of any such rule.

That the employment of private counsel to assist in the prosecution of offenders is generally recognized in this country is shown by the following quotation from Bishop on Criminal Procedure:

> The prosecuting officer, while conducting a cause, may, with the concurrence of the court, be assisted by other legal persons. That they are paid by the party injured or his friends, or appear at the request of the governor of another State, does not render them incompetent. (Vol. 1, § 281, and cases cited.)

In *United States* v. *Hanway* (2 Wall, jr., 207), which was an indictment for treason, Mr. Justice Grier thus concluded his charge to the jury:

> I can not conclude this charge to the jury without availing myself of the occasion which it offers to express the satisfaction which the court has in seeing here the attorney-general of the State of Maryland and the private counsel associated with him; for although the ordinary officers of the United States are deserving of all praise for the vigilance, ability, and learning they have shown in bringing offenders to justice, the indignation felt by the people of Maryland at the calamitous and disgraceful murder of Mr. Gorsuch, is most natural indeed; and we receive their representatives here, in defence of the law, with cordial respect and readiness, in the hope that it may efface all angry feeling between the people of these two States and foster those of respect and friendship.

THIRD.

It is unnecessary to do more with reference to this third assignment of error than refer to what has been said under the second.

FOURTH AND FIFTH.

These assignments refer to the twenty-seventh instruction (p. 62) defining the offense of manslaughter to the jury.

The statutes of Utah define manslaughter as "an unlawful killing of a human being without malice," and classify it under the heads of "voluntary, upon a sudden quarrel or heat of passion," and "involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Compiled Laws, 1876, § 1921, p. 586.)

The definition of voluntary manslaughter necessarily refers to the common law to supply everything that the generality of the definition calls for.

It was in defining what is meant by the terms "sudden quarrel or heat of passion" that the trial judge laid down that to reduce the homicide to manslaughter on the ground that it "was com-

mitted in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender uncontrollable passion in any ordinary man, will suffice."

It is alleged to be error to have laid down that passion, as a palliating element, must be "*irresistible*" or "*uncontrollable*" to constitute manslaughter.

But it is conceived that the law in this particular was given to the jury correctly.

Mr. Bishop, in his criminal law, says that "the passion must be such as is sometimes called *irresistible*" (vol. 2, sec. 697).

In *Regina* v. *Kelly*, tried before Mr. Baron Rolfe, at Monmouth assizes, 1838, that learned judge, in his summing up to the jury, said that it was manslaughter only for a man to kill one surprised in adultery with his wife, "because he would be supposed to be acting *under an impulse*

so violent that he could not resist it" (2 C. & K., p. 814).

In *Rex* v. *Hayward* (6 C. and P., 157), tried before Tindal, C. J., that learned judge told the jury that the principal question for their consideration would be "whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment *the master of his own understanding;* in which case, the law in compassion to human infirmity would hold the offense to amount to manslaughter only; or whether there had been time for the blood to cool, and *for reason to resume its seat before the mortal wound was given*, in which case the crime would amount to willful murder." Again he said, "It would be for them to say whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of this weapon and again replacing it immediately after the blow was struck, for the exercise of contrivance and design denoted rather the presence of judgment and reason *than of violent* and ungovernable passion."

mitted in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender uncontrollable passion in any ordinary man, will suffice."

It is alleged to be error to have laid down that passion, as a palliating element, must be "*irresistible*" or "*uncontrollable*" to constitute manslaughter.

But it is conceived that the law in this particular was given to the jury correctly.

Mr. Bishop, in his criminal law, says that "the passion must be such as is sometimes called *irresistible*" (vol. 2, sec. 697).

In *Regina* v. *Kelly*, tried before Mr. Baron Rolfe, at Monmouth assizes, 1838, that learned judge, in his summing up to the jury, said that it was manslaughter only for a man to kill one surprised in adultery with his wife, "because he would be supposed to be acting *under an impulse*

so violent that he could not resist it" (2 C. & K., p. 814).

In *Rex* v. *Hayward* (6 C. and P., 157), tried before Tindal, C. J., that learned judge told the jury that the principal question for their consideration would be "whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment *the master of his own understanding;* in which case, the law in compassion to human infirmity would hold the offense to amount to manslaughter only; or whether there had been time for the blood to cool, and *for reason to resume its seat before the mortal wound was given*, in which case the crime would amount to willful murder." Again he said, "It would be for them to say whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of this weapon and again replacing it immediately after the blow was struck, for the exercise of contrivance and design denoted rather the presence of judgment and reason *than of violent* and ungovernable passion."

The very words of these learned judges are given in the text of Wharton on Homicide, pp. 178–9 (ed. 1855; see, also, p. 188, *note*).

In his Digest of the Criminal Law of England, Sir James Fitzjames Stephen presents the law as to provocation in the same way. He says:

> Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act *deprived of the power of self-control by the provocation which he has received*, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind. (Dig., article 225, p. 150, ed. 1877, London.)

In *Preston* v. *The State* (25 Miss., 387) the law is thus stated by Chief-Justice Smith:

> It is laid down, that the law having a regard for the frailty of human nature, will not put an act done upon a sudden impulse and in the heat of passion on the same footing in regard to guilt with a deed deliberately performed. *The indulgence shown by the law in such cases proceeds on the supposition that the reason or judgment of the party perpetrating the act has been temporarily suspended or overthrown by the sudden access of violent passion.*

Mr. East, after giving a number of examples illustrating the law of homicide from transport of passion or heat of blood, says:

> In all the instances above enumerated the party killing is supposed to have taken all advantages in the heat of blood over the person slain; but to have received such a provocation as the law presumes might in human frailty heat the

blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered *as having acted under a temporary suspension of reason*, than from any deliberate malicious motive. (Pl. Cr. vol. 1, p. 238, ed. London 1803.)

It must be admitted that the law as thus laid down and as given by the trial court is in harmony with the spirit of a jurisprudence which placed homicide in self-defense upon a sudden affray and homicide by misadventure under the head of *excusable* homicide, punishable by forfeiture of goods, if not at one time by death, as Lord Coke says (2 Inst., 148, 315), which treated the necessity of inflicting death in the former case as culpable, *culpabilis necessitas*, and which *presumed malice from the mere fact of killing.*

In all this we see the aim of the common law to make homicide more odious, and to protect human life from one of its greatest enemies, human violence.

The spirit of the common law of homicide is that men must learn to curb their passions, and that if a man has not the strength to resist the onset of passion in a particular case he must suffer at the hands of public justice.

At the same time that law recognizes the fact that the ordinary man is but too apt to fall under the sway of passion, and it makes a condescension to that infirmity, declaring, as to homicide, that where human life is taken under a sudden provocation, which was calculated to arouse in the slayer an uncontrollable desire for revenge, the killing shall not be murder but manslaughter.

That such is the true spirit and teaching of the common law is made manifest by the repeated rulings of the courts that when a man takes another in the act of adultery with his wife and kills him directly on the spot, it is not justifiable, it is not excusable, but it is *felonious* homicide. The slayer, though acting in a tempest, a frenzy of passion, is none the less a *felon*.

It is very true that it was for the jury to say what is the amount of passion, but it is not true, as maintained in the opposite brief, that it was with the jury to say what amount of passion was necessary to reduce the killing to manslaughter. It was for the court to say what degree of passion was necessary to palliate the killing. There

could be no stability in the law, in this particular, if every jury could determine as to the juridical character of the provocation set up in prosecutions for homicide.

It is not true that the case is one of manslaughter, if any offense at all. In other words the evidence shows that the jury might properly have found that the accused did the killing with malice.

It appears from the evidence of the only witness of the shooting (Jerry Tiberty, pp. 1–19) that the deceased and Calton, who were sitting side by side on the driver's seat of a wagon, got into a scuffle, as the result of Calton's having forcibly taken a bottle of whisky from the deceased. Each had the other by the throat and deceased, the more powerful of the two, either had struck or was in the act of striking Calton when Tiberty interfered, using force to separate the two. Calton said, "Let's quit," whereat they both let go. The deceased remained quiet in his seat, but Calton jumped to the ground, and having seized his pistol that lay wrapped in a bundle in the

wagon, immediately discharged the contents of five chambers into the deceased, who neither stirred nor uttered a word, dying immediately.

It was certainly for the jury to say whether Calton exclaimed "*let's quit*" as a mere ruse to get out of the grasp of the deceased, who was the stronger of the two, so that he might secure his pistol; and whether from Calton's whole bearing he was not moved by deliberate malice against the deceased.

It seems that the deceased was drunk, but the other two were not so much under the influence of liquor as not to know well what they were about. On this point the evidence does not seem to leave much room for doubt.

SIXTH.

It is alleged as error that the court instructed the jury touching the defense of insanity, that the test of the prisoner's responsibility was his ability to distinguish between right and wrong at the time of and with respect to the alleged criminal act (p. 62).

It would seem that the prisoner has no ground of complaint in this particular, for it is very apparent that there was not a particle of evidence of insanity to go to the jury. The most that the witnesses for the defense show is that the prisoner was sometimes moody, and that this disposition was largely caused by the proneness of his companions to make a butt of him.

But supposing there was some evidence of insanity, the court laid down the law correctly in the absence of evidence to show that the prisoner had a particular delusion, which was the cause of the homicide, in which case, what is called "the right and wrong test," might have been misleading. (*People* v. *Hoin*, 62 Cal., 120; *People* v. *Flannagan*, 52 N. Y., 462; *Comm.* v *Rogers*, 7 Met., 500.)

But, as we have said, there was not a particle of evidence of insanity, and it was altogether favorable to the accused to instruct the jury in such wise as to make them think there was such evidence. The court ought to have declined to instruct the jury on that head at all.

SEVENTH.

As to this assignment it may be said that if the court see from the evidence in the bill of exceptions, which the court certifies to be all the evidence adduced on the trial (p. 1), that none of it was relevant to the indictment it may reverse the judgment, but not otherwise, it is conceived so long as there was anything to go to the jury.

EIGHTH.

The judgment directs that the accused shall be "publicly shot." But the law of the Territory forbids public executions. This may be treated as a clerical mistake which may be corrected by the court that pronounced the judgment, and will be corrected, certainly, after intimation from this court.

A record may be amended even in a criminal case. Thus it was held that the mistake in the name of the judge before whom the indictment was found, and the entire omission of the name of the judge before whom the case was tried, might be corrected by the court in which the

record was. (*State* v. *Croton*, 6 Ired. (N. C.) L., 164; *Comm.* v. *Judd*, 2 Mass., 334; *Comm.* v. *Field*, 11 Allen, 488; *State* v. *McComb*, 18 Iowa, 47; *Kennedy* v. *People*, 44 Ill., 283.)

It is also assigned for error (p. 4) that the trial judge violated the prisoner's rights in that, after saying to the jury that drunkenness was no excuse for crime, he added, "For when a crime is committed by a party in a fit of intoxication the *law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such a crime*" (p. 62); and it is furthermore assigned as error that the judge concluded what he had to say touching evidence of drunkenness generally as a palliation of crime with the remark "that it should be received with caution, and carefully examined" (p. 62).

In the first place, it is to be observed that both remarks objected to were made as assertions of general established truths and without any special reference to the prisoner.

The judge having laid down, very properly, that where the question in a case is whether a

party committed a crime with a particular intent, the fact that the accused was drunk at the time may be taken into consideration—as, for instance, to determine whether a person who had committed a homicide was too drunk to have done it with the premeditated set purpose required to constitute murder in the first degree, and it is not easy to see how the prisoner was in any way prejudiced by the remarks objected to. The jury were well aware that drunkenness was gross vice and misconduct, and there was nothing in the judge's remark to that effect at all calculated to lessen the value in their minds of the evidence before them tending to show that the prisoner was drunk.

The same may be said of the other remark; for it was very proper in the judge to say to the jury that they should examine the evidence of drunkenness with caution and care before allowing it to give complexion to the prisoner's act. If it is ever proper to give the jury such a caution, it was in this case, where there was so much to show that the prisoner was as capable as any-

body of deliberation. (*People* v. *Williams*, 43 Cal., 344; *People* v. *Belencia*, 21 Cal., 544; *People* v. *King*, 27 Cal., 507; *People* v. *Franklin*, 70 Cal., 641; *People* v. *Mills*, 98 N. Y., 176, 182–3.)

To say that the judge violated the Territorial law in this particular and charged the jury as to the weight of the evidence of drunkenness, or in any way invaded their province, is hard to comprehend.

In *Hopt's Case* (110 U. S., 574), referred to in the brief (p. 5), the court, speaking of the homicide then in question, said that "an atrocious and dastardly murder has been committed by some person," a remark which this court said was naturally regarded by the jury as laying down that the homicide imputed to the accused was murder in the first degree, by whomsoever committed, thus seriously interfering with the province of the jury in the very matter they were sworn to try. But we entirely fail to see the analogy between the action of the court in Hopt's case and the action of the court in this case.

In his dissenting opinion Judge Henderson says it was error in the trial judge not to call the attention of the jury to section 1920, Comp. Laws, 1876, p. 586, which declares that "Every person guilty of murder in the first degree shall suffer death, or, upon recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court." * * *

To this it may be replied that the Territorial law also provides that "the judge must then [meaning at a previously mentioned stage of the trial] charge the jury, *if requested by either party*," etc. (Laws 1878, p. 115, Sec. 257; sub. sec. 7.) It was the traverser's fault if this provision was not mentioned to the jury, and it is too late to make the objection now. (*Comm.* v. *Stowell*, 9 Met., 573, and other cases cited *supra*.)

It is respectfully submitted that the judgment must be affirmed.

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